No. 95-1100-CFX Title: Board of the County Commissioners of Bryan County, Oklahoma, Petitioner
v.
Jill Brown, et al.

Docketed:
January 10, 1996 Court: United States Court of Appeals for the Fifth Circuit

Entry	Date	Proceedings and Orders
	Jan 5 1996	Petition for writ of certiorari filed. (Response due February 9, 1996)
	Feb 9 1996	Brief of respondent Jill Brown in opposition filed.
	Feb 21 1996	DISTRIBUTED. March 15, 1996
	Mar 18 1996	REDISTRIBUTED. March 22, 1996
	Mar 19 1996	Record requested.
	Apr 9 1996	Record filed.
	Apr 10 1996	REDISTRIBUTED. April 26, 1996
	Apr 16 1996	REDISTRIBUTED. April 19, 1996
	Apr 22 1996	Petition GRANTED. SET FOR ARGUMENT November 5, 1996. **********
	May 6 1996	Order extending time to file brief of petitioner on the merits until June 21, 1996.
	Jun 20 1996	Brief amicus curiae of City of New York filed.
	Jun 21 1996	Brief amici curiae of Washington Legal Foundation, et al. filed.
	Jun 21 1996	Brief amici curiae of National Association of Counties, et al. filed.
	Jun 21 1996	Joint appendix filed.
	Jun 21 1996	Brief of petitioner Board of The County Commissioners of Bryan County, OK filed.
	Jul 24 1996	Brief amici curiae of NOW Legal Defense And Education Fund, et al. filed.
	Jul 24 1996	Brief of respondent Jill Brown filed.
	Aug 26 1996	Reply brief of petitioner Bryan County Board of Commissioners filed.
	Sep 16 1996	CIRCULATED.
	Nov 5 1996	ARGUED.

1PP

(1) 95 Nd 1007

In The

Supreme Court of the United States

October Term, 1995

THE BOARD OF THE COUNTY COMMISSIONERS OF BRYAN COUNTY, OKLAHOMA,

Petitioner,

vs.

JILL BROWN, *et al.*,

Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

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10 pp

QUESTIONS PRESENTED

1. Does the United States Constitution impose liability on a County for a single hiring decision that comports with state law in every respect, when there is no evidence that the County's hiring practice in the past has resulted in the deprivation of a citizen's constitutional rights?

2. Does the hiring of a Reserve Deputy Sheriffwho has one misdemeanor conviction for assault and battery and traffic violations establish a causative link (amounting to deliberate indifference) between the decision to hire him and his subsequent use of force during the course of an arrest?

3. Are federalism concerns implicated by an opinion which imposes liability on a County for hiring a Reserve Sheriff Deputy with one misdemeanor assault and battery conviction and other minor offenses, when the State of Oklahoma proscribes only the hiring of individuals with felony records?

LIST OF ALL PARTIES*

1.	Board of the County Commissioners of Bryan County, Oklahoma	Defendant/ Petitioner
2.	Jill Brown	Plaintiff/Respondent
3.	Stacy Burns	Defendant/Respondent

• Since the district court dismissed the claims against Robert Morrison (a deputy sheriff) and B.T. Moore (the sheriff), they are not listed as parties in this proceeding.

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The Board of the County Commissioners of Bryan County, Oklahoma respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. B, *infra*, 4a-29a) is reported at 67 F.3d 1174. A superseded opinion of the court of appeals is reported at 53 F.3d 1410. The opinion of the district court (App. C, *infra*, 30a-37a) is unreported.

STATEMENT OF JURISDICTION

The court of appeals entered its judgment on October 23, 1995. Petitioner's Petition for Rehearing of Substituted Opinion and Suggestion for En Banc Consideration were denied by written order on November 29, 1995. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourth Amendment of the United States Constitution provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched and the persons or things to be seized.

42 U.S.C. § 1983 provides, in relevant part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

Oklahoma Statute Title 70, § 3311 (West 1994) provides that:

> No person shall be certified as a police or peace officer in this state unless the employing agency has reported to the Council that:
>
> a. the Oklahoma State Bureau of Investigation and the Federal Bureau of Investigation have reported that such person has no record of a conviction of a felony or crime involving moral turpitude,
>
> b. such person has undergone psychological evaluation. . . . The psychological instrument utilized shall be evaluated by a psychologist licensed by the State of Oklahoma, and the employing agency shall certify to the Council that the evaluation was conducted in accordance with this provision and that the employee/applicant is suitable to serve as a peace officer in the State of

> Oklahoma. . . . This section shall also be applicable to all reserve peace officers in the State of Oklahoma, and
>
> c. such person possesses a high school diploma or a GED equivalency certificate. . . .

STATEMENT OF THE CASE

This case concerns the extent to which federal courts have constitutional authority to fashion minimum hiring qualifications for law enforcement personnel that exceed minimum standards enacted by state legislatures. In particular, the question is whether a county of government can be held to have violated the constitution by hiring a police reserve deputy with a background of misdemeanor arrests, who is found to have subsequently used excessive force in arresting a suspect, when the reserve deputy is not disqualified from employment as a matter of state substantive law. The legislature of the State of Oklahoma, having considered minimum qualifications for police-officer service, did not exclude persons with misdemeanor-arrest backgrounds from law enforcement employment. There was no evidence that the County's hiring practices resulted in a pattern of constitutional deprivations.

Although the question has never been resolved by this Court, Justice O'Connor has suggested, in a similar context, that, except where a municipality's policy is "substantially certain" to result in violation of constitutional rights, failure to train can result in municipal liability only where a pattern of constitutional violations arising from the policy puts the city on notice of the problem. *City of Canton, Ohio v. Harris*, 489 U.S. 378, 109 S. Ct. 1197, 103 L. Ed. 2d 412 (1989) (O'Connor, J., concurring in part and dissenting in part). Justice O'Connor noted that "Allowing an inadequate training claim such as this

one to go to the jury based upon a single incident would only invite jury nullification of *Monell*." In this case, the *only* alleged instance of "inadequate hiring" is the claim upon which respondent bases her complaint. Moreover, the County had discretion under state substantive law to make that hiring decision. Rather than confront those facts under a proper *Canton* analysis, the Fifth Circuit has essentially held that the State of Oklahoma does not have the right to employ deputies who have had prior misdemeanor arrests. The result is not only a nullification of *Monell*, but a serious blow to federalism.

A. Proceedings Below

Jill Brown commenced this suit under 42 U.S.C. § 1983 alleging that Bryan County, Oklahoma and three officers were guilty of violating her constitutional rights. Thus, the district court properly had jurisdiction on the basis of federal question jurisdiction according to 28 U.S.C. § 1331. She sued Stacy Burns (a reserve deputy sheriff), Robert Morrison (a deputy sheriff), B.J. Moore (the sheriff), and the Board of the County Commissioners of Bryan County, Oklahoma ("Bryan County"). Brown alleged that Stacy Burns' actions in forcibly removing her from a vehicle and handcuffing her during an investigatory stop amounted to excessive force that deprived her of rights under the Fourth, Fifth, Eighth and Fourteenth Amendments to the United States Constitution.

Brown alleged that Bryan County violated the Constitution either: (1) by hiring Burns or (2) failing to adequately train Burns. The district court denied the defendants' motion for summary judgment. The case was tried to a jury, which found that Stacy Burns arrested Jill Brown without probable cause; that Stacy Burns employed excessive force; that Stacy Burns falsely imprisoned Brown; and that Stacy Burns was not entitled to the defense of qualified immunity.

The jury also answered interrogatories concerning Bryan County. The jury found the County liable under state tort theories of negligent hiring and negligent training. With respect to liability under § 1983, the jury found as follows:

> 1. That the hiring policy of Bryan County **"in the case of Stacy Burns"** was so inadequate as to amount to deliberate indifference to the constitutional needs of the plaintiff;
>
> 2. That the training policy of Bryan County **"in the case of Stacy Burns"** was so inadequate as to amount to deliberate indifference to the constitutional needs of the plaintiff.

The jury assessed a total of $765,300 in actual damages; $87,500 in attorneys fees; and $20,000 in exemplary damages, for a total award of $872,500. Finding no evidence of loss of income in the past or loss of earning capacity in the future, the court rendered judgment against Brown for those amounts. Thus, the district court entered judgment against Burns and the County for the $711,302 in actual damages; $87,500 in attorneys fees; and $20,000 in punitive damages. The district court did not award Brown any recovery against defendants Morrison and Moore. Burns and the County appealed the judgment.

In its opinion, the Fifth Circuit held that the County's hiring of Stacy Burns violated Jill Brown's constitutional rights. The court recognized that Burns had met the requirements for employment mandated by Oklahoma law. However, the court found that Burns' misdemeanor offenses would allow a jury to conclude "that Burns had a propensity for violence and a disregard for the law, thus, precluding his employment." *Brown v. Bryan County, Okl.*, 67 F.3d at 1184 n.20 (App. B, 22a). The

court wrote that the County's "single action of hiring Burns without an adequate review of his background directly caused the constitutional violations of which Mrs. Brown now complains." *Id.* at 1185 (App. B, 24a).

Justice Emilio Garza dissented from the majority's opinion and judgment with respect to Bryan County. In Justice Emilio Garza's view, "*one* inadequate background investigation, even by a municipal policymaker, is not the 'unconstitutional municipal policy' of which *Monell, Pembaur,* or *Tuttle* speaks." *Id.* at 1185. (internal citations omitted). Justice Emilio Garza articulated the basis for his dissent as follows:

> I do not agree, therefore, with the majority's implicit reasoning, explicitly stated in *Gonzalez*, that any "distinction between policies that are themselves unconstitutional and those that cause constitutional violations" is "metaphysical." ... The majority incorrectly, in my opinion, follows our opinion in *Gonzalez* in holding that Sheriff Moore's single decision created municipal liability, without reconciling the Supreme Court's instruction in *Tuttle* that a jury must have "considerably more proof than the single incident" before it can find causation. . . .

Justice Emilio Garza would have reversed the judgment as to Bryan County. *Id.* at 1187 (App. B, 27a).

B. Summary of the Issues

1. Federalism

There is no constitutional provision or federal law forbidding the hiring of an individual with a background of

misdemeanor arrests. There is no state law precluding the County from employing such a person; indeed, the State of Oklahoma proscribes only the hiring of deputies with convictions for felonies or crimes involving moral turpitude. Okla. Stat. Ann. Tit. 70, § 3311(D)(2) (West 1994). Where the hiring decision is not itself unconstitutional and no federal law governs the hiring decision, concepts of federalism dictate that the State of Oklahoma's qualifying standards for police service should control. *See Rizzo v. Goode*, 423 U.S. 362, 378-380, 46 L. Ed. 2d 561, 96 S. Ct. 598 (1976). In the absence of a pattern of constitutional deprivations arising from the adoption of a particular hiring standard, there is no constitutional basis for holding a county liable for its personnel choices.

The court of appeals justified finding a constitutional violation based on Stacy Burns' prior misdemeanor convictions, which, in the court's view, demonstrated a "propensity for violence and a disregard for the law" that *precluded* the County from employing him in the first place. 53 F.3d at 1184 n.20. The convictions were for offenses Burns committed during a college-campus brawl, several traffic violations, and one arrest for being in physical control of a vehicle while intoxicated. Thus, the Fifth Circuit has crafted a minimum hiring standard — apparent nowhere in the United States Constitution — which a county cannot disturb without committing a constitutional violation. The court's substitution of a federal hiring standard for Oklahoma's, without articulating any reasoned basis for such, will "engage the federal courts in an endless exercise of second-guessing municipal [hiring] programs" which, as this Court has recognized, "implicates serious questions of federalism." *Canton v. Harris*, 489 U.S. 378, 392 (1989).

2. Causation

Respondent Jill Brown failed to establish a direct link

between the county's hiring of Burns and a constitutional deprivation. At most, Brown demonstrated that Burns had had two fights before becoming a reserve deputy, one of which resulted in a misdemeanor assault and battery conviction. The court of appeals seized upon those offenses and a series of traffic violations to effectively hold that — as a matter of constitutional law — Burns was disqualified *ab initio* from serving as a police reserve deputy. Under that approach, the county would be strictly liable for any constitutional deprivation caused by Burns or any other deputy with a similar background. Such a holding amounts to permitting precisely the theory of strict respondeat superior liability rejected in *Monell*.

REASONS FOR GRANTING THE WRIT

This Court has held that a single decision by a single policymaker can result in municipal liability under appropriate circumstances. *Pembaur v. City of Cincinnati*, 475 U.S. 469 (1986). In *Pembaur*, however, the singular decision of an authorized policymaker actually ordered the carrying out of an unconstitutional act. *Id.* at 483 n.11. In this case, the hiring decision was not, in itself, unconstitutional. Moreover, unlike *Pembaur*, it is undisputed in this case that the County's hiring conformed to the State of Oklahoma's legislative screening standards.

The Fifth Circuit's opinion charges the county with identifying, along the spectrum of human behavior, the precise components of a police candidate's prior behavior that would "likely" result in the candidate's subsequent use of unconstitutionally excessive force. In this case, the Fifth Circuit pinpointed this inevitable predisposition on Reserve Deputy Burns' misdemeanor arrests. Would the county have been liable, under the Fifth Circuit's standard, had Burns had one less traffic violation? What is the constitutional standard governing

a county's future hiring decisions? Neither question can be answered by consulting the Fifth Circuit's opinion. It is essential that this Court fill the vacuum.

Petitioner believes that the answer lies, at least in part, in an application of federalism. The State of Oklahoma has enacted legislation requiring screening of potential law enforcement personnel. Okla. Stat. Ann. Tit. 70, § 3311(D)(2) (West 1994). The legislation prohibits political subdivisions from employing reserve deputies with felony records or convictions involving crimes of moral turpitude. The County did not offend those minimal standards in hiring Reserve Deputy Burns. Thus, the situation here is far different from *Pembaur*, in which the policymaker actually ordered and authorized an unconstitutional act. Here, the County conformed its conduct to the legislative screening process and hired a reserve deputy who, so far as the State of Oklahoma was concerned, passed the litmus test for hiring. Moreover, the evidence at trial established conclusively that the County had never received any complaint that its reserve deputies, or any peace officer in its employ, had ever been engaged in violating citizens' constitutional rights as a result of the county's conforming with the state's hiring standards.

Thus, the question squarely presented is whether, in the absence of any pattern of constitutional deprivations arising from a county's hiring practice, the county's decision to hire one reserve deputy – who meets every qualification to serve – subjects the county to liability for the deputy's subsequent use of force during an arrest. Absent notice that hiring personnel with misdemeanor records results in a pattern of constitutional deprivations, a municipality may not be subjected to liability for one instance of hiring a person who is subsequently found to have used excessive force. In the absence of other similar instances, a county's hiring decision cannot reasonably be equated with deliberate indifference.

I.

THE COURT OF APPEALS' OPINION IMPROPERLY SUBSTITUTES A FEDERALIZED NOTION OF MINIMAL POLICE HIRING STANDARDS FOR STANDARDS ENACTED BY THE STATE OF OKLAHOMA.

The State of Oklahoma leaves to its political subdivisions the discretion to hire deputies whose records are devoid of felony convictions or crimes involving moral turpitude. *See* Okla. Stat. Ann. Tit. 70, § 3311(D)(2) (West 1994). In addition to those standards, Oklahoma requires deputies to meet stringent training requirements, to be supervised by licensed peace officers and, as a predicate to certification, to pass a battery of psychological testing. Thus, in the State of Oklahoma, a county is authorized to hire a reserve deputy even if the deputy has a record of misdemeanor arrests and traffic violations. The Fifth Circuit, however, has held that a county subjects itself to liability, under § 1983, if a person hired under Oklahoma's scheme is subsequently found to have deprived a citizen of constitutional rights.

The court of appeals concluded it did not matter that petitioner had offended none of the hiring requirements enacted by the State of Oklahoma; it did not matter that, prior to this case, petitioner had never had complaints that its conformity with State hiring standards produced violations of citizens' constitutional rights; it was irrelevant that Stacy Burns was qualified to serve as a reserve deputy according to Oklahoma law. The Fifth Circuit held that Burns was *precluded* from serving as a reserve deputy because of his background of misdemeanor arrests. The danger in such a holding should be evident; rather than analyze policy and custom to determine municipal liability under § 1983 and the United States Constitution, the court of appeals has arrogated to itself the

power to determine if a state's particular hiring standards meet the court's own minimum federal standards.

There is no limiting principle apparent in the court's opinion. In this case, where the reserve deputy had misdemeanor arrests for a college campus brawl and several traffic violations, the court of appeals held the county to be "deliberately indifferent" for hiring him. It is unclear whether, in another case, a similar applicant with one less offense would meet the new federal personnel policy. In any event, it is clear that the court of appeals has effectively placed a shadow injunction on the State of Oklahoma's statutory qualifications for reserve-deputy and peace-officer employment. Juries will now be charged with determining municipal liability under section 1983 based on whether the municipality was "precluded" from hiring a person otherwise qualified under state law.

The federalism concern has, in prior decisions of this Court, been central in defining municipal liability. Without some limitation on liability, the "deliberate indifference" standard of *City of Canton v. Harris* will devolve into "an endless exercise of second-guessing" hiring determinations that, so far as state law is concerned, pass muster. *City of Canton v. Harris*, 489 U.S. at 392. In this case, where there is no evidence that the county's conformity with State of Oklahoma standards ever resulted in a pattern of constitutional deprivations, the Fifth Circuit's conclusion that the county was "deliberately indifferent" in hiring Reserve Deputy Burns amounts to an intrusion on state sovereignty to oversee the administration of its own law. *Rizzo v. Goode*, 423 U.S. at 378.

II.

THE COURT OF APPEALS' INTERPRETATION OF § 1983'S "DELIBERATE INDIFFERENCE" STANDARD RESULTS IN A NULLIFICATION OF *MONELL V. DEPT. OF SOCIAL SERVICES OF THE CITY OF NEW YORK.*

In *City of Canton*, this Court addressed whether a policy that is not in itself unconstitutional may nevertheless give rise to municipal liability. In addressing claims that a municipality inadequately trained its police officers, this Court held that the municipality could be held liable under § 1983 only if "the failure to train amounts to deliberate indifference to the rights of persons with whom the police come into contact." 489 U.S. at 390 n.10, 109 S. Ct. at __ n.10, 103 L. Ed. 2d at 427. Justice Brennan, in his concurring opinion in *City of Canton*, recognized that courts applying the "deliberate indifference" standard in a failure-to-train case "required a showing of a pattern of violations from which a kind of 'tacit authorization' by city policymakers can be inferred." 489 U.S. at 397, 109 S. Ct. at __, 103 L. Ed. 2d at 432. On numerous occasions, the Fifth Circuit and other circuits have agreed that a pattern of violations is necessary to support municipal liability in most instances. This case presents the classic case where prior notice of constitutional deprivations would be required for municipal liability.

It is not *unconstitutional* to employ a reserve deputy who has a misdemeanor arrest record. In and of itself, a hiring decision does not result in respondeat superior liability each time the hired employee commits an act depriving a citizen of constitutional rights. Hiring decisions that are constitutional *may* result, in a "but for" sense, in the deprivation of constitutional rights; but such philosophic causes, without more, are not enough to establish municipal liability. Neither is

negligence the proper standard. When the constitution marks the bounds of municipal liability, the causation element must meet a higher standard. That higher standard — deliberate indifference — is not met simply because a jury (or court) is offended by nepotism in a small county.

When a municipal policy is, itself, constitutional, the "deliberate indifference" standard can be satisfied one of two ways. First, the policy can be so certain to result in the deprivation of constitutional rights that a city may be held deliberately indifferent. *City of Canton*, 489 U.S. at 390 n.10, 109 S. Ct. at __, n. 10, 103 L. Ed. 2d at 427 n.10 (failing to instruct police officers in the use of deadly force). It is the extremity of the risk that subjects the municipality to liability under that circumstance. There are times, as in *City of Canton*, that the risk is self-evident to a "moral certainty." *Id.* It cannot be said with that same degree of certitude that individuals who have had two fights, years prior to joining a law enforcement agency, will use excessive force in arresting an individual.

Under the court of appeals' new standard, what used to be *constitutional* county policy — Oklahoma's vesting county's with discretion to hire peace officers (even with misdemeanor backgrounds) so long as they meet the state's minimum qualifications, undergo specified training, and have no felony convictions or arrests for crimes involving moral turpitude — has now become *unconstitutional ab initio*. The breadth of such a holding is astounding. As the court of appeals bluntly stated, such persons are now "precluded" from employment as law enforcement officers. This new federalized hiring standard usurps state standards and thereby subjects municipalities to § 1983 liability for pure hiring decisions. The panel does not attempt to articulate the constitutional basis for the imposition of such minimal hiring standards. Prior to this case, the Fifth Circuit rightly rejected the notion that states must conform their

training and hiring practices to meet some minimal federal standard. *See Benavides v. County of Wilson*, 955 F.2d 968, 974-75 (5th Cir. 1992), *cert. denied sub nom. Bassler v. County of Wilson*, __ U.S. __, 113 S. Ct. 79, 121 L. Ed. 2d 43 (1992).

It is also not the case, as the court of appeals assumed, that past misconduct or past emotional disability precludes future law enforcement service. *Benavides v. County of Wilson*, 955 F.2d at 974-75 (no evidence that County would have dismissed deputies from force had it had detailed accounting of deputies' prior history of psychological disorders). Likewise, there is no evidence here that Bryan County would have (or should have) dismissed Burns on the basis that Burns had one misdemeanor assault conviction stemming from a campus fight. Indeed, under Oklahoma law, the legislature has ceded to sheriffs the discretion to determine whether to employ individuals with prior misdemeanor convictions. *Haworth v. Central National Bank*, 769 P.2d 740, 743 (Okla. 1989) (recognizing Oklahoma legislature's "direct intervention and control over law enforcement officers through adoption of statute forbidding employment of felons or individuals convicted of crime involving moral turpitude).

It would be a different matter altogether if Brown had been able to demonstrate Bryan County adopted a "policy" of hiring such individuals, and that that policy resulted in *other* incidents of excessive force sufficient to alert the County that fights in college lead to excessive force in the rank and file. Of course, as even the court of appeals conceded, there is absolutely no evidence of any such pattern. 67 F.3d at 1185 n. 22 (App. B, 24a). Under these circumstances, the panel's opinion directly conflicts with this court's opinion in *Stokes v. Bullins*, 844 F.2d 269, 274-77 (5th Cir. 1988) (prior arrests did not disqualify officer from service; no persistent, widespread pattern of hiring policemen with a background of unjustified violence).

This is the second lesson of *City of Canton*. If there is no obvious, inevitable link between the constitutional policy and the deprivation of constitutional rights, then it must be shown that the policymaker was "aware of, and acquiesced in, a pattern of constitutional violations. . . ." *Id.*, 489 U.S. at 397, 109 S. Ct. at __, 103 L. Ed. 2d at 432. Until now, that has been the standard enforced in this circuit. *See Languirand v. Hayden*, 717 F.2d 220, 227 (5th Cir. 1983), *cert. denied sub nom. Languirand v. Pass Christian*, 467 U.S. 1215 (1984), *Stokes*, 844 F.2d at 274-75; *Fraire v. Arlington*, 957 F.2d 1268 (5th Cir.), *cert. denied*, __ U.S. __ (1992). *See also, Hill v. Dekalb Regional Youth Detention Center*, 40 F.3d 1176, 1195 (11th Cir. 1994) (requiring frequency of unconstitutional deprivation as prerequisite to County liability); *Hirsch v. Burke*, 40 F.3d 900, 904 (7th Cir. 1994) (pattern of constitutional violations is prerequisite to recovery against municipality for inadequate training).

III.

THE FIFTH CIRCUIT'S CONCLUSION THAT BRYAN COUNTY WAS DELIBERATELY INDIFFERENT IS NOT SUPPORTED BY THE FACTS.

This case presents only one instance of an alleged constitutional violation — the incident of excessive force Mrs. Brown asserts. By establishing municipal liability based on Bryan County's hiring decision, this case establishes a greatly expanded potential for liability under the auspices of section 1983. The court of appeals' opinion concludes that based upon Burns' history of arrests the jury could have found that Burns had a "propensity for violence and a disregard for the law" which " preclud[ed] his employment." 67 F.3d at 1184 n. 20 (App. B, 22a). The evidence of this "propensity" is stark indeed; in no way can it be said to a moral certainty that a person with such a background is, as a matter of constitutional law, forever barred from law enforcement service.

Burns' criminal record includes the following categories of citations and arrests: (1) nine moving traffic violations; (2) Actual Physical Control of a motor vehicle while intoxicated; (3) driving with a suspended license; (4) assault and battery; (5) possession of false identification and (6) resisting arrest. Categories one through three fail to indicate any predisposition on the part of Stacy Burns to commit violent acts. Thus, these components of the "rap sheet" Sheriff Moore had obtained in the application process fail to support an inference of deliberate indifference to the constitutional violation at issue – excessive force. Neither does the possession of false identification support this type of inference.

The remaining misdemeanors, when properly examined, lack the drama woven into the court of appeals' opinion. Both charges resulted from a fight with fraternity members which occurred while Stacy Burns was at the University of Oklahoma in September of 1989. At the time of this incident Burns had just turned nineteen. As a result of the fight, Burns pled guilty to assault and battery. The Fifth Circuit opines that this type of evidence should have somehow placed Bryan County on notice that despite training, supervision, psychological evaluations and testing, Burns would nevertheless be predisposed to committing acts of unconstitutional aggression. Under principles not only of federalism but of common sense, the State of Oklahoma and Bryan County could logically conclude that a person with Burns background can, under proper supervision, redeem himself and serve the force with distinction. The evidence simply does not establish to a moral certainty that the county was deliberately indifferent in deciding that Burns could, in spite of the one campus fight, serve as a reserve deputy.

Oklahoma's requirements for service in its sheriffs' departments are detailed in Okla. Stat. Ann. Tit. 70, § 3311(D)(2) (West 1994). The Oklahoma Statute creates a

Council on Law Enforcement Education and Training that is responsible for promulgating rules and regulations regarding certification and policies for admission requirements for Oklahoma officers. § 3311(A), (B). This statute provides that applicants with felony convictions or crimes involving moral turpitude are disqualified from service. § 3311(D)(2)(a). Additionally, the statute requires that the applicant undergo one of several psychological tests approved by the Council on Law Enforcement Education and Training which is then evaluated by a licensed psychologist. § 3311(D)(2)(b). The applicant must also possess a high school diploma or a GED equivalency certificate and must satisfactorily complete a basic police course of 120 hours. § 3311(D)(2)(c).

This statute promulgated by the Oklahoma Legislature outlines the official policy in effect at the time Bryan County hired Stacy Burns. Bryan County followed each of the requirements of the legislation in its hiring procedures of all its applicants, including Stacy Burns. None of the charges in Burns' record fall within the categories which require disqualification under Oklahoma law. Furthermore, the additional prerequisites for service were followed in the hiring of Stacy Burns.

The law of the State of Oklahoma, therefore, authorized the hiring decision of Sheriff Moore. As a protection for constitutional violations, section 1983 was never intended to disturb objectively reasonable legislative decisions regarding the requirements for employment by municipal authorities. Under the guise of constitutional authority, the court of appeals has determined that a single constitutional hiring decision authorized by the laws of that State may constitute a policy or custom sufficient to establish municipal liability when it has never been demonstrated that a person's history of misdemeanor arrests would inevitably result in the violation of citizens' constitutional rights.

CONCLUSION

This is an ideal case for this Court to demonstrate how federalism affects a federal court's review of municipal liability. The new Fifth Circuit standard holds that, even if there is evidence of only *one* incident arising from a policy that is not in itself unconstitutional, municipal liability is established if the County was "precluded" from hiring an officer in the first place by virtue of two adolescent fights. Under this standard, the court of appeals concluded that it did not matter that Bryan County *never* had a similar incident in the past; it did not matter that the County had *always* conducted adequate background investigations with respect to *every other* officer and cadet candidate; it did not matter that the *only* incident of excessive force Burns was *ever* charged with stemmed from his confrontation with Jill Brown after the high-speed pursuit; it did not matter that Stacy Burns had *never* had a felony conviction, or that his criminal record revealed only *one* misdemeanor episode of violence. Instead, the court of appeals focused on the singular instance of the hiring of Burns, declared that that hiring "policy" was, in itself, sufficient to show deliberate indifference, and concluded that there is an "affirmative link" between hiring a deputy with misdemeanors in his past and any excessive force he uses while so employed. That is *respondeat superior* liability, which *Monell* forbids and which this Court has rejected. Such a marked departure from once-settled constitutional doctrine deserves review by this Court by granting a writ of certiorari.

These reasons justify a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit.

Respectfully submitted,

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APPENDIX A — ORDER DENYING REHEARING OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT DATED NOVEMBER 29, 1995

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 93-5376

JILL BROWN,

Plaintiff-Appellee,
Cross-Appellant,

versus

BRYAN COUNTY, OK, ET AL.

Defendants,

BRYAN COUNTY, OK and STACY BURNS,

Defendants-Appellants,
Cross-Appellees.

Appeal from the United States District Court for the
Eastern District of Texas

ON PETITION FOR REHEARING AND SUGGESTION
FOR REHEARING EN BANC

(Opinion , 5 Cir., , F.3d)

(November 29, 1995)

Appendix A

Before REYNALDO G. GARZA, WIENER, and EMILIO M. GARZA, Circuit Judges.

PER CURIAM:

* * *

(x) The Petition for Rehearing is DENIED and the Court having been polled at the request of one of the members of the Court and a majority of the Judges who are in regular active service not having voted in favor, (FRAP and Local Rule 35) the Suggestion for Rehearing En Banc is also DENIED.

* * *

ENTERED FOR THE COURT:

s/ Reynaldo G. Garza
United States Circuit Judge

CLERK'S NOTE:
SEE FRAP AND LOCAL
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APPENDIX B — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT DATED OCTOBER 23, 1995

**JILL BROWN, Plaintiff-Appellee,
Cross-Appellant,**

v.

BRYAN COUNTY, OK, et al., Defendants,

**Bryan County, OK and Stacy Burns,
Defendants-Appellants, Cross-
Appellees.**

No. 93-5376.

United States Court of Appeals,

Fifth Circuit.

Oct. 23, 1995.

* * *

Appeals from the United States District Court for the Eastern District of Texas.

(Opinion June 2, 5th Cir.,
1995, 53 F.3d 1410)

Before REYNALDO G. GARZA, WIENER and EMILIO M. GARZA, Circuit Judges.

Appendix B

REYNALDO G. GARZA, Circuit Judge:

SUBSTITUTE PANEL OPINION[1]

A claim for damages was brought against Reserve Deputy Stacy Burns (Burns) and Bryan County, Oklahoma (Bryan County),[2] by Jill Brown (Mrs. Brown) pursuant to 42 U.S.C. § 1983 and Oklahoma law. The case proceeded to trial, in which the jury found in favor of the Plaintiff on every interrogatory submitted. The district court entered a judgment in accordance with the jury's verdict with one exception: Mrs. Brown was not allowed to recover for loss of past income or future earning capacity. Burns and Bryan County (collectively the "Appellants") appeal the judgment against them while Mrs. Brown appeals the portion of the judgment that denied her recovery for lost past income and future earning capacity. For the reasons stated below we affirm the district court's judgment.

BACKGROUND

In the early hours of May 12, 1991, Todd Brown (Mr. Brown) and Mrs. Brown were traveling from Grayson County, Texas, to their home in Bryan County, Oklahoma. After crossing into Oklahoma, Mr. Brown, who was driving, noticed a police checkpoint. He decided to avoid the checkpoint and

1. The original panel opinion, to which Judge Emilio M. Garza dissented, *Brown v. Bryan County, Ok.*, 53 F.3d 1410 (5th Cir.1995), is withdrawn and is replaced in toto by this opinion, in which Judge Wiener continues to concur.

2. This suit was originally brought against several parties, but the district court dismissed the claims concerning the other Defendants, leaving Bryan County and Stacy Burns as the only Defendants.

Appendix B

headed back to Texas, allegedly to spend the night at his mother's house. Although the parties offer conflicting stories leading to the pursuit, Deputy Sheriff Robert Morrison (Deputy Morrison) and Burns stated that they "chased" the Browns' vehicle at a high rate of speed before successfully pulling it over. Mr. Brown testified that he was oblivious to the deputies' attempts to overtake him until both vehicles had traveled approximately three miles.[3] By the time the two vehicles eventually stopped, the parties had crossed into Grayson County, Texas, four miles from the Oklahoma checkpoint.

Immediately after exiting the squad car, Deputy Morrison unholstered his weapon, pointed it toward the Browns' vehicle and ordered the occupants to raise their hands. Burns, who was unarmed,[4] rounded the corner of the truck to the passenger's side. After twice ordering Mrs. Brown from the vehicle, Burns pulled her from the seat of the cab and threw her to the ground. Burns employed an "arm bar" technique whereby he grabbed Mrs. Brown's arm at the wrist and elbow, extracted her from the vehicle and spun her to the ground. Mrs. Brown's impact with the ground caused severe injury to her knees, requiring corrective surgery.[5] While Mrs. Brown was pinned to the ground, Burns handcuffed her and left to assist Deputy

3. Apparently, the road traveled on was winding, thereby, diminishing the visibility of other vehicles approaching from behind.

4. Although Burns was working for the Sheriff's Department, he was not authorized to carry a firearm or drive a squad car.

5. Mrs. Brown received a total of four operations on her knees. Moreover medical testimony was elicited at trial which showed that Mrs. Brown would ultimately require total knee replacements.

Morrison in subduing her husband. Mrs. Brown remained handcuffed anywhere from a minimum of thirty minutes to just over an hour.

According to Mrs. Brown's version of the facts, which will be reviewed in greater detail below, the deputies' pursuit and the force consequently applied against her were unprovoked. Furthermore, she claims that her detention constituted false imprisonment and false arrest. Due to the injuries resulting from that encounter, Mrs. Brown seeks compensation from Burns and Bryan County. Mrs. Brown premised the county's liability, inter alia, on the hiring of Burns by Sheriff B.J. Moore (Sheriff Moore), the county policymaker for the Sheriff's Department.

DISCUSSION

The Appellants have presented this Court with a host of issues to support their position that the lower court erred. For efficiency's sake, we will address only those points that we believe merit review. We first address the claims against Burns for the constitutional injuries that Brown suffered.

I.

In their first argument, Burns and Bryan County allege that the force applied against Mrs. Brown was proper. Appellants claim that the evidence "undisputedly" established that Burns' actions on the morning of May 12, 1991, were objectively reasonable. Therefore, the jury's findings should be reversed.

All claims that a law enforcement officer has used excessive force — deadly or not — in the course of an arrest, investigatory stop, or other "seizure" of a free citizen, are

analyzed under the Fourth Amendment and its "reasonableness" standard. *Graham v. Connor*, 490 U.S. 386, 395, 109 S.Ct. 1865, 1871, 104 L.Ed.2d 443 (1989). The test of reasonableness under the Fourth Amendment requires

> careful attention to the facts and circumstances of each particular case, including the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight.

Id. at 396, 109 S.Ct. at 1872. The "reasonableness" of the particular force used must be judged from the perspective of a reasonable officer at the scene, rather than with the 20/20 vision of hindsight. *Id.* In cases implicating excessive force, "not every push or shove, even if it may later seem unnecessary in the peace of a judge's chambers," violates the Fourth Amendment. *Id.* (citation omitted). Thus, the question is whether the officer's actions are "objectively reasonable" in light of the facts and circumstances confronting him, without regard to his underlying intent or motivation. *Id.* at 397,109 S.Ct. at 1872.

Determining whether Burns' actions were reasonable depends on whose story the trier of fact accepts as true. According to the testimony of Burns and Deputy Morrison, they were involved in a "high-speed" pursuit[6] after the Browns abruptly turned their truck and sped from the checkpoint.

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6. The deputies testified that they were pursuing the Browns at speeds in excess of 100 miles per hour.

After a four mile "chase" both vehicles came to a full stop. The deputies exited their vehicle and made several commands for the occupants to raise their hands before those commands were obeyed. After rounding the truck, Burns twice ordered Mrs. Brown to exit the vehicle, but she did not comply. He then perceived that she was "lean[ing] forward" in the cab of the truck as if she were "grabbing a gun."[7] He was "scared to death," so he extracted her from the vehicle. He spun her around, dropped her to the ground via the arm bar maneuver and handcuffed her. That was the lowest amount of force he deemed necessary to extract her and ensure he and his partner's safety.

Certainly, Appellants' version of the facts supports a claim that Burns acted reasonably and with an appropriate amount of force. The Browns, however, paint a strikingly different picture. They testified that they were oblivious to the attempts made by the deputies to catch up to them (the Browns) after avoiding the Oklahoma checkpoint.[8] Mr. Brown avoided that stop because he feared the possibility of being harassed or unnecessarily detained by the deputies.[9] He

7. The fact that two firearms were found in the truck *after* the arrest does not make Burns actions any more or less reasonable, unless his actions had resulted from the observation of those guns prior to the arrest. That was not the case, however.

8. Mr. Brown testified that initially, he did not hear any police sirens, or observe a squad car following them. Finally, after driving for several minutes at speeds of 40 to 55 miles per hour, he glimpsed the blue lights from the deputies' vehicle and determined that he was being pursued. He stopped the truck at the first available opportunity.

9. Mr. Brown alleged that he had been unnecessarily detained at that checkpoint on several occasions.

further testified that he did not believe that he turned the truck around either in a reckless fashion nor with wheels squealing or throwing gravel, and that he drove away at a normal rate of speed. Finally realizing that they were being pursued, Mr. Brown pulled over only to find a gun pointed at him. They were ordered to put their hands up and they did so.

Mrs. Brown then testified that Burns ran to her side of the vehicle and ordered her to get out. She was paralyzed with fear and heard Burns repeat the command. According to her testimony, however, she was not slow in responding to Burns' orders and she did not make any sudden moves while exiting the vehicle. Her only forward movement was to exit the truck and, contrary to Burns' testimony, she did not reach for anything. Then, while she was exiting the truck, Burns suddenly grabbed her arm, yanked her out, spun her around and threw her to the pavement. She could not break her fall because one arm was raised and Burns firmly gripped the other.

In addition to this conflicting testimony, both sides elicited expert testimony concerning the reasonableness of Burns' actions. Mrs. Brown's expert, for example, concluded that the force applied by Burns in this situation was unjustified and excessive.[10] The jury weighed all the evidence, evaluated the conflicting testimony and rendered a verdict in Mrs. Brown's favor. Under our standard of review,[11] when the

10. The expert did acknowledge that the force used was the lowest force that could have been applied in extracting and subduing an arrestee without endangering either party. However, he did not feel that the situation required this type of force.

11. The standard for appellate review of a jury's verdict is exacting.

(Cont'd)

evidence supports the verdict, this Court will not impose its own opinion in contravention to the jury's. Therefore, we will not interfere with the fact finder's conclusion that Burns' actions were unreasonable and that the force he used was excessive.

II.

Notwithstanding the jury's findings, Appellants also assert that there was probable cause to arrest Mrs. Brown. They argue that the facts justified Burn's actions, thereby precluding Mrs. Brown's § 1983 claim for false arrest.

There is no cause of action for false arrest under § 1983

(Cont'd)
Granberry v. O'Barr, 866 F.2d 112, 113 (5th Cir.1988). It is the same standard as applied in awarding a directed verdict or a judgment notwithstanding the verdict and is referred to as the "sufficiency of the evidence" standard. *Id.* The standard is as follows:

> "The verdict must be upheld unless the facts and inferences point so strongly and so overwhelmingly in favor of one party that reasonable men could not arrive at any verdict to the contrary. If there is evidence of such quality and weight that reasonable and fair minded men in the exercise of impartial judgment might reach different conclusions, the jury function may not be invaded."

Id. (quoting *Western Co. of North Am. v. United States*, 699 F.2d 264, 276 (5th Cir.), *cert. denied*, 464 U.S. 892, 104 S.Ct. 237, 78 L.Ed.2d 228 (1983)). Stated another way, the Court should consider all of the evidence, not just that evidence which supports the non-movant's case, in the light and with all reasonable inferences most favorable to the non-movant. *Boeing Co. v. Shipman*, 411 F.2d 365, 374 (5th Cir.1969) (en banc).

unless the arresting officer lacked probable cause. *Fields v. City of South Houston*, Tex., 922 F.2d 1183, 1189 (5th Cir.1991). To determine the presence or absence of probable cause, one must consider the totality of the circumstances surrounding the arrest. *United States v. Maslanka*, 501 F.2d 208, 212 (5th Cir.1974),[12] *cert. denied*, 421 U.S. 912, 95 S.Ct. 1567, 43 L.Ed.2d 777 (1975). Whether officers have probable cause depends on whether, at the time of the arrest, the " 'facts and circumstances within their knowledge and of which they had reasonably trustworthy information were sufficient to warrant a prudent man in believing that [the arrested] had committed or was committing an offense' " *Id.* (quoting *Beck v. Ohio*, 379 U.S. 89, 91, 85 S.Ct. 223, 225, 13 L.Ed.2d 142 (1964)). Furthermore, although flight alone will not provide probable cause that a crime is being committed, in appropriate circumstances it may supply the " 'key ingredient justifying the decision of a law enforcement officer to take action.' " *United States v. Bowles*, 625 F.2d 526, 535 (5th Cir.1980) (quoting *United States v. Vasquez*, 534 F.2d 1142, 1145 (5th Cir.), *cert. denied*, 429 U.S. 979, 97 S.Ct. 489, 50 L.Ed.2d 587 (1976)).

To reiterate, whether Burns had probable cause to arrest Mrs. Brown depends in large part on whether the facts, as Burns knew them, were sufficient to warrant a prudent man's belief that Mrs. Brown committed or was in the process of committing a crime. The facts material to that determination

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12. In *Maslanka*, a police officer observed a car coming down a road and, upon seeing his unmarked car, it turned around and sped away in flight. This Court found that this observation provided sufficient facts for an officer to investigate. *Maslanka*, 501 F.2d at 213. Upon stopping the car, the officer smelled marihuana smoke, creating the probable cause necessary to arrest the passengers. *Id.*

were hotly contested, especially the contradictory testimony relating to the pursuit and Mrs. Brown's movements while exiting the vehicle. Thus, it was for the fact finder to determine whether Burns had probable cause to arrest Mrs. Brown. *Harper v. Harris County, Tex.*, 21 F.3d 597, 602 (5th Cir. 1994). Assuming *arguendo* that the deputies had a reasonable suspicion to perform an investigatory stop, we nevertheless find the evidence sufficient to support the jury's finding that Burns did not have probable cause to arrest Mrs. Brown, and that his doing so violated her constitutional right to be free from false arrest.

As the jury found that Burns did not have probable cause to detain or arrest Mrs. Brown, it could also find from the evidence that she was falsely imprisoned. To set out a claim for false imprisonment the plaintiff must prove (1) an intent to confine, (2) acts resulting in confinement, and (3) consciousness of the victim of confinement or resulting harm. *Harper v. Merckle*, 638 F.2d 848, 860 (5th Cir. Unit B Mar.), *cert. denied*, 454 U.S. 816, 102 S.Ct. 93, 70 L.Ed.2d 85 (1981). Under § 1983, the plaintiff must also prove the deprivation of a constitutional right, i.e., an illegality under color of state law. *Id.* The evidence establishes that Mrs. Brown believed herself to be under arrest: even though she had committed no crime, she remained handcuffed for approximately an hour before being released, during which time she was never informed of the nature of the charges for which she was being detained, and subsequently no charges were ever brought. In light of such evidence, a finding of false imprisonment is proper.[13]

13. As this Court finds that liability was proper for the claims of excessive force, false arrest and false imprisonment, it need not address the state law issues involved herein.

III.

Appellants also contest the jury's finding that Burns was not entitled to qualified immunity. A proper analysis of a qualified immunity defense requires us to conduct a two (sometimes three) prong inquiry. *See Siegert v. Gilley*, 500 U.S. 226, 111 S.Ct. 1789, 114 L.Ed.2d 277 (1991); *Harlow v. Fitzgerald*, 457 U.S. 800, 102 S.Ct. 2727, 73 L.Ed.2d 396 (1982). First, we determine "whether the plaintiff has asserted a violation of a constitutional right at all." *Siegert*, 500 U.S. at 232, 111 S.Ct. at 1793. Second, we establish whether the law was clearly established at the time of the official's action. *Siegert*, 500 U.S. at 233, 111 S.Ct. at 1794; *Harlow*, 457 U.S. at 815-19, 102 S.Ct. at 2737-38. Third, we evaluate the "objective reasonableness of [the] official's conduct as measured by reference to clearly established law." *Harlow*, 457 U.S. at 818,102 S.Ct. at 2739. It is clear that by 1991, use of excessive force, false arrest and false imprisonment had been held to violate citizens' constitutional rights, thus the qualified immunity defense fails if Burns did not act with probable cause. And as the trier of fact determined that Burns did not have probable cause to arrest Mrs. Burns, he is not entitled to qualified immunity.[14]

IV.

Burns asserts that the evidence is insufficient to support the jury's award of punitive damages. He argues that

14. "While it is correct that the reasonableness of the arresting officer's conduct under the circumstances is a question of law for the court to decide, such is not the case where there exist material factual disputes . . ." *Harper v. Harris County, Tex.*, 21 F.3d 597, 602 (5th Cir.1994) (discussing officer's qualified immunity).

application of the arm bar technique did not rise to a level of "flagrant" conduct and further, that it did not evidence malice or give rise to an inference of evil intent.[15] Nevertheless, the Supreme Court has ruled that punitive damages are recoverable in a § 1983 action. *Smith v. Wade*, 461 U.S. 30, 35, 103 S.Ct. 1625, 1629, 75 L.Ed.2d 632 (1983). One of the primary reasons for § 1983 actions and punitive damages is to deter future egregious conduct. *Id.* at 49, 103 S.Ct. at 1636. A jury may assess punitive damages in an action under § 1983 if the defendant's conduct is shown to be motivated by evil motive or intent, or involved reckless or callous indifference to the federally protected rights of others. *Id.* at 56, 103 S.Ct. at 1640. The question is whether the acts of Burns, which caused the deprivation of Mrs. Brown's constitutional rights, rose to a level warranting the imposition of punitive damages. In light of the evidence before it, we believe that the jury could properly infer that Burns' acts were unjustified and that he acted with callous or reckless indifference to Mrs. Brown's constitutional rights. Therefore, punitive damages were justified.

V.

On cross-appeal, Mrs. Brown argues that it was error for the district court to grant Appellants' Motion for Judgment Notwithstanding the Jury Verdict (JNOV) as it relates to her claims for loss of past income and future earning capacity.[16]

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15. Mrs. Brown did not respond to this argument in her briefs.

16. In the order, the district court stated "[t]he jury awarded plaintiff substantial damages in this case, including $36,000 for loss of income in the past and $180,000 for loss of earning capacity in the future. After a review of the evidence in this case, the Court is convinced that there is no legally sufficient

(Cont'd)

Mrs. Brown asserts that neither Bryan County nor Burns specifically raised an issue concerning the sufficiency of the evidence supporting that portion of the judgment, thus the district court's action was unjustified and the award must be reinstated. She insists that there is absolutely no legal predicate on which the district court could base its actions. Therefore, as evidence was offered to support this award, Mrs. Brown argues that the original jury award should be reinstated.

This Court has determined that it "would be a constitutionally impermissible re-examination of the jury's verdict for the district court [or this Court] to enter judgment n.o.v. on a ground not raised in the motion for directed verdict." *McCann v. Texas City Refining, Inc.*, 984 F.2d 667, 672 (5th Cir.1993). It is undisputed that the Appellants did not address the sufficiency of the evidence supporting the jury's award for loss of past income and future earning capacity in their motions for either directed verdict or JNOV. Thus, the lower court should not have decided whether sufficient evidence exists to support this award. However, as the Appellants point out, Mrs. Brown failed to object to this error at trial, and it is the "unwavering rule in this Circuit that issues raised for the first time on appeal are reviewed only for plain error." *Id.* In other words, this Court will reverse only if the error complained of results in a "manifest miscarriage of justice." *Id.* Furthermore, contrary to Mrs. Brown's contention, the issue is not whether *any* evidence exists to support the jury verdict. Instead, the issue is whether the district court's action constituted plain error.

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evidentiary basis for the award of these damages. Therefore, judgment should be granted for the defendants on plaintiff's claims for loss of income in the past and loss of earning capacity in the future."

Upon reviewing the record, we do not believe that the lower court's error resulted in a manifest miscarriage of justice. The only evidence offered in support of the award comprised of Mrs. Brown's testimony, which reflected that she had accepted an offer to commence work a few days after the day of the incident. Her compensation would have been measured on a commission basis, which she believed would have paid between $1,500 to $1,800 a month. The district court's ruling that this evidence was lacking does not arise to plain error. Mrs. Brown's failure to object at the appropriate time denied the district court the opportunity to rectify any errors. Therefore, the court's ruling will stand.

VI.

Having found that Burns violated Mrs. Brown's constitutional rights, the next inquiry concerns the possible liability of Bryan County. Liability will accrue for the acts of a municipal official when the official possesses "final policymaking authority" to establish municipal policy with respect to the conduct that resulted in a violation of constitutional rights. *Pembaur v. City of Cincinnati*, 475 U.S. 469, 483, 106 S.Ct. 1292, 1300, 89 L.Ed.2d 452 (1986) (plurality opinion).

Bryan County stipulated that Sheriff Moore was the final policymaker for the Sheriff's Department. As such, it is patently clear that Sheriff Moore[17] is an official "whose acts or edicts may fairly be said to represent official policy and whose

17. Appellants failed to object to the jury instructions which referred to Sheriff Moore as the final policymaker. *See Gonzalez v. Ysleta Indep. Sch. Dist.*, 996 F.2d 745, 754 (5th Cir. 1993) (failure to lodge an objection to court's instructions regarding the final policymaker waived the issue).

decisions therefore may give rise to municipal liability under § 1983." *Id.* at 480, 106 S.Ct. at 1299 (citing *Monell v. Department of Social Services*, 436 U.S. 658, 694, 98 S.Ct. 2018, 2037, 56 L.Ed.2d 611 (1978)).

Mrs. Brown argues that a municipality can be held liable under § 1983 based on a final policymaker's single decision regarding the hiring or training of one individual. Appellants, on the other hand, argue that § 1983 liability cannot attach on the basis of a policymaker's single, isolated decision to hire or train one individual.

An argument similar to the Appellants' was rejected by this Court in *Gonzalez v. Ysleta Indep. Sch. Dist.*, 996 F.2d 745, 754 (5th Cir.1993). In *Gonzalez*, the Ysleta Independent School District (YISD) was sued for a single decision to transfer a teacher accused of sexually harassing a student, rather than removing him from the classroom. YISD argued that this ad hoc, isolated decision, even when made by policymakers, did not constitute the sort of "policy" upon which municipal liability could be predicated under *Monell*. This was especially true there, insisted YISD, as the decision was contrary to the district's own formal policy for handling such matters. This argument proved unpersuasive.

Based on the facts before it, the *Gonzalez* panel concluded that the final policymaker's single, conscious decision, i.e., the Board of Trustee's decision to transfer the teacher rather than remove him from the classroom, constituted a "policy" attributable to the school district. *Gonzalez*, 996 F.2d at 754. This conclusion was logical, as "[n]o one has ever doubted . . . that a municipality may be liable under § 1983 for a *single decision* by its properly constituted legislative body . . .

because even a single decision by such a body unquestionably constitutes an act of official government policy." *Pembaur*, 475 U.S. at 480, 106 S.Ct. at 1298 (emphasis added).[18] To deny compensation to the victim in such a case would be contrary to the fundamental purpose of § 1983. *Id.* at 481, 106 S.Ct. at 1299. So, it is clear that a single decision may create municipal liability *if* that decision were made by a final policymaker responsible for that activity.

Mrs. Brown argues that Burns' lengthy criminal history should have prevented Sheriff Moore from hiring him. Burns' history revealed a string of offenses that, she claims, demonstrates a disregard for the law and a propensity for violence. Moreover, she maintains that a thorough investigation of Burns' background would have revealed that his parole had been violated by his numerous offenses. Thus, she argues that Burns' screening and subsequent employment by Sheriff Moore were inadequate and subjected Bryan County to liability.

During the application process Sheriff Moore ordered a printout of Burns' criminal record, which revealed the following citations and arrests: nine moving traffic violations, Actual Physical Control (APC) of a motor vehicle while intoxicated, driving with a suspended license, arrest for

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18. In *Pembaur*, the Supreme Court held that a county prosecutor's single decision, ordering law officers to forcibly enter a dentist's office, was actionable under § 1983. 475 U.S. at 480-81, 106 S.Ct. at 1298-99. However, the Court cautioned that liability would only attach where the course of action was deliberately chosen by a decisionmaker possessing final authority to establish municipal policy. *Id.* at 481, 106 S.Ct. at 1299. We note that Mr. Pembaur's § 1983 action was premised on a theory of municipal policy and not on a theory of municipal custom. *Id.* n. 10.

assault and battery, conviction for possession of a false identification and an arrest for resisting lawful arrest. When Sheriff Moore was examined about Burns' "rap sheet," the following exchange took place:

> Q. Did you make an inquiry with the proper authorities in Oklahoma to get a copy of Mr. Burns' rap sheet?
>
> A. I run his driving record, yes.
>
> Q. All right. And you can get that rap sheet immediately, can't you?
>
> A. It don't take long.
>
> Q. All right. And did you not see on there where Mr. Burns had been arrested for assault and battery? Did you see that one on there?
>
> A. I never noticed it, no.
>
> Q. Did you notice on there he'd been arrested or charged with [Driving While License Suspended] on several occasions?
>
> * * * * * *
>
> A. I'm sure I did.
>
> Q. All right. Did you notice on there that he'd been arrested and convicted for possession of false identification?

A. No, I never noticed that.

Q. Did you notice on there where he had been arrested for public drunk?

A. He had a long record.

Q. Did you notice on there where he had been arrested for resisting arrest?

A. No, I didn't.

Q. Did you make any inquiries after you got that information to determine exactly what the disposition of those charges were?

A. No, I didn't.

Q. Did you not make any attempt to find out the status of Mr. Burns' criminal record at that time?

A. As far as him having a criminal record, I don't believe he had a criminal record. It was just all driving and — most of it was, misdemeanors.

Q. Well, did you make any attempts to determine whether or not Mr. Burns was on probation at the time you placed him out there?

A. I didn't know he was on probation, no.

Q. Did you make any effort to find out?

A. I didn't have no idea he was on probation, no.

Q. Well, you saw on his rap sheet where he had been charged with [Driving Under the Influence], didn't you?

A. I had heard about that. I don't remember whether I had seen it on the rap sheet or not.

Q. So you'd heard about it?

* * * * * *

A. I don't remember whether I seen it on the rap sheet or heard about it.

Besides this damaging testimony, Mrs. Brown's expert[19] testified regarding the importance of properly screening law enforcement applicants. The expert testified that a thorough investigation process is needed to weed out individuals who enter the police force for the wrong reasons, for example, because "they like to exert their power." In light of Burns' arrest record, the expert concluded that he showed a "blatant

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19. The record shows that the expert, Dr. Otto Schweizer, had spent over twenty years in law enforcement, including, several years as a field training officer, a police chief and as a professor of criminal justice and police administration at the University of Central Oklahoma.

disregard for the law and problems that may show themselves in abusing the public or using excessive force," thereby rendering Burns unqualified for a position in law enforcement. The expert further testified that as a minimum, Sheriff Moore should have investigated the disposition of the charges against Burns. Even Appellants' expert, Ken Barnes, agreed that Burns' criminal history should have caused some concern, meriting a further review of the applicant. More importantly, when Mr. Barnes was asked if he would have hired Burns, he replied that it was "doubtful."

From the foregoing evidence, the jury could have reasonably inferred that Sheriff Moore "closed his eyes" to Burns' background when hiring him. This inference is reinforced by Burns' familial relations within the Sheriff's Department: not only is Burns the son of Sheriff Moore's nephew, but Burns' grandfather had been involved with the department for more than sixteen years. Alternatively, the jury could have inferred that Sheriff Moore was indeed aware of Burns' past problems with the law and was therefore cognizant of his deficient character, but nevertheless opted to employ him because he was "family".[20] Again, the innuendos of nepotism only bolster the inference that Burns would have been hired regardless of his criminal history.

We believe that the evidence supports the jury's conclusion that Sheriff Moore did not conduct a good faith investigation of Burns. Although it is true that Sheriff Moore

20. In light of the string of arrests and convictions, a jury could properly conclude that Burns had a propensity for violence and a disregard for the law, thus, precluding his employment. We deem such a conclusion proper, even though Burns had no felonies on his record. Oklahoma law prevents a sheriff from hiring an individual convicted of a felony or a crime involving moral turpitude. OKLA. STAT.ANN. tit. 70, § 3311(d)(2) (West 1994).

ran a NCIC check of Burns, this action was futile given that Burns' arrest history was all but ignored. Sheriff Moore conceded that Burns' record was so long that he did not bother to examine it. And, except for this feeble attempt to screen him, no other effort was made to investigate Burns. A further examination would have revealed that Burns had repeatedly violated probation, and that a warrant was subsequently issued for his arrest. In light of this history, it should have been obvious to Sheriff Moore that a further investigation of Burns was necessary.

We also find the evidence sufficient for a jury to conclude that Sheriff Moore's decision to hire Burns amounted to deliberate indifference to the public's welfare. *See Stokes v. Bullins*, 844 F.2d 269, 275 (5th Cir.1988); *Wassum v. City of Bellaire, Texas*, 861 F.2d 453, 456 (5th Cir.1988); *Benavides v. County of Wilson*, 955 F.2d 968, 972 (5th Cir.), *cert. denied*, __ U.S. __, 113 S.Ct. 79, 121 L.Ed.2d 43 (1992). In light of the law enforcement duties assigned to deputies, the obvious need for a thorough and good faith investigation of Burns, and the equally obvious fact that inadequate screening of a deputy could likely result in the violation of citizens' constitutional rights, Sheriff Moore can reasonably be said to have acted with deliberate indifference to the public's welfare when he hired Burns. *See City of Canton v. Harris*, 489 U.S. 378, 390, 109 S.Ct. 1197, 1205, 103 L.Ed.2d 412 (1989).[21] The failure to conduct a good faith investigation of the prospective

21. Further, the lower court's charge to the jury was proper: "Sheriff B.J. Moore would have acted with deliberate indifference in adopting an otherwise constitutional hiring policy for a deputy sheriff the need for closer scrutiny of Stacy Burns' background was so obvious and the inadequacy of the scrutiny given so likely to result in violations of constitutional rights, that Sheriff B.J. Moore can be reasonably said to have been deliberately indifferent to the constitutional needs of the Plaintiff."

employee amounted to Sheriff Moore deliberately closing his eyes to the Burns' background.[22] Such indifferent behavior cannot be tolerated when the prospective applicant will be employed in a position of trust and authority.

Additionally, the jury could find that hiring an unqualified applicant and authorizing him to make forcible arrests actually caused the injuries suffered by Mrs. Brown. That is, the policymaker's (Sheriff Moore's) single action of hiring Burns without an adequate review of his background directly caused the constitutional violations of which Mrs. Brown now complains. *Benavides*, 955 F.2d at 972; *Fraire v. City of Arlington*, 957 F.2d 1268, 1277 (5th Cir.) (section 1983 liability attaches only "where the municipality itself causes the constitutional violation" at issue), *cert. denied*, __ U.S. __, 113 S.Ct. 462, 121 L.Ed.2d 371 (1992). Therefore, the violation of Mrs. Brown's constitutional rights was affirmatively linked to Bryan County's decision to hire Burns for law enforcement activities. *Stokes v. Bullins*, 844 F.2d 269, 276 (6th Cir.1988).

CONCLUSION

After a thorough review of the record, this Court finds that the evidence supports the jury's verdict holding Burns and Bryan County liable for Mrs. Brown's § 1983 claim based on her false arrest, false imprisonment and the inadequate hiring of Burns. We also find that the district court did not plainly err

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22. It is certainly true that the Sheriff had conducted adequate background checks on other deputies and assured himself that they were certified before putting them on the street, but the fact that he diverged from that practice as to this one individual does not save the County from liability. *See Gonzalez v. Ysleta Indep. Sch. Dist.*, 996 F.2d 745, 754 (5th Cir.1993).

in dismissing the jury's award for Mrs. Brown's loss of past income and future earning capacity. For these reasons, the jury's verdict stands and the district court's judgment is

AFFIRMED.

Appendix B

EMILIO M. GARZA, Circuit Judge, concurring in part and dissenting in part:

Although I concur in most of the opinion of the Court, I dissent from Part VI of the opinion and the judgment as to Bryan County. My disagreement is with the majority's treatment of the *Monell*[1] issue — "it is clear that a single decision may create municipal liability *if* that decision were made by a final policymaker responsible for that activity" maj. op. at __ — which is based on our prior opinion in *Gonzales v. Ysleta Indep. Sch Dist.*, 996 F.2d 745, 754 (5th Cir.1993).

Clearly, Sheriff Moore was a policymaker under *Monell*; clearly, he hired Reserve Deputy Stacy Burns; clearly, there is sufficient evidence to support a finding that Sheriff Moore was deliberately indifferent in failing to conduct an adequate background investigation.[2] However, *one* inadequate background investigation, even by a municipal policymaker, is not the "unconstitutional municipal policy" of which *Monell, Pembaur v. City of Cincinnati*, 475 U.S. 469, 106 S.Ct. 1292, 89 L.Ed.2d 452 (1986), or *City of Oklahoma City v. Tuttle*, 471 U.S. 808, 105 S.Ct. 2427, 85 L.Ed.2d 791 (1985), speaks. This error, in my opinion, flows from blurring the

1. *Monell v. Department of Social Servs.*, 436 U.S. 658, 98 S.Ct. 2018, 56 LEd.2d 611 (1978).

2. Under *Stokes v. Bullins*, 844 F.2d 269 (5th Cir.1988), "We . . . require a plaintiff [in cases such as this] to establish actual knowledge of the seriously deficient character of an applicant or a persistent, widespread pattern of the hiring of policemen, for instance, with a background of unjustified violence." *Id.* at 275 n. 9. Although the majority does not state explicitly that the jury could have found that Sheriff Moore actually knew of Burnns' criminal record, because the evidence supports such a finding, I do not disagree with the majority's conclusion that Sheriff Moore was deliberately indifferent.

Appendix B

distinction made clear in *Tuttle* — "where the policy relied upon is *not* itself unconstitutional, considerably *more proof than the single incident* will be necessary in every case to establish both the requisite *fault* on the part of the municipality, *and* the *causal connection* between the 'policy' and the constitutional deprivation." *Tuttle*, 471 U.S. at 824, 105 S.Ct. at 2436 (footnote omitted) (emphasis added).

I do not agree, therefore, with the majority's implicit reasoning, explicitly stated in *Gonzalez*, that any "distinction between policies that are themselves unconstitutional and those that cause constitutional violations" is "metaphysical." *Gonzalez*, 996 F.2d at 754 & n. 11 (quoting *Tuttle*, 471 U.S. at 833 n. 8, 105 S.Ct. at 2441 n. 8 (Brennan, J., concurring)). The majority incorrectly, in my opinion, follows our opinion in *Gonzalez* in holding that Sheriff Moore's single decision created municipal liability, without reconciling the Supreme Court's instruction in *Tuttle* that a jury must have "considerably more proof than the single incident" before it can find causation.[3] There is a constitutional difference between a sheriff ordering his deputies to violate citizen's constitutional rights, *see, e.g., Pembaur*, 475 at 484-85, 106 S.Ct. at 1300-01 (imposing liability for County Prosecutor's direct order to police officers to violate Fourth Amendment), and one that hires a reserve deputy without conducting an adequate background investigation. In the latter instance, greater proof is required in order to establish the connection between the policy and the constitutional violation. *See Pembaur*, 475 U.S. at 482 n. 11, 106 S.Ct. at 1299-1300 n. 11

3. Indeed, because *Gonzalez* eventually was decided on the question of deliberate indifference, the causation question was never firmly resolved. *See Gonzalez*, 996 F.2d at 754 (stating only that the policy "may have produced or caused the constitutional violation").

(plurality opinion) (noting that *Tuttle* required the plaintiff to "establish that the unconstitutional act was taken *pursuant to* a municipal policy rather than simply resulting from such a policy in a 'but for' sense"); *see also City of Canton v. Harris*, 489 U.S. 378, 385, 109 S.Ct. 1197, 1203, 103 L.Ed.2d 412 (1989) (requiring a "direct causal link between a municipal policy or custom and the alleged constitutional deprivation"); *Benavides v. County of Wilson*, 955 F.2d 968, 972 (5th Cir.) (requiring plaintiff to show that "the inadequate hiring . . . policy directly caused the plaintiff's injury"), *cert. denied*, __ U.S. __, 113 S.Ct. 79, 121 L.Ed.2d 43 (1992).

The Court in *Pembaur* concluded "that municipal liability *may* be imposed for a single decision by municipal policymakers *under appropriate circumstances*." *Pembaur*, 475 U.S. at 480,106 S.Ct. at 1298. The Court also stated that *Tuttle* was "consistent" with its holding that "the policy which *ordered* or *authorized* an unconstitutional act *can* be established by a single decision by proper municipal policymakers." *Id.* at 482 n. 11, 106 S.Ct. 1299-1300 n. 11 (plurality opinion). Therefore, it is not clear that Sheriff Moore's single act of deliberate indifference in fact established "policy," even though *Pembaur* holds that a single act "*may*" or "*can*" establish policy "under appropriate circumstances." I do not believe that the Court in *Pembaur* intended to suggest that *any* and *every* act by a final municipal policymaker constitutes, without more, "municipal policy." Sheriff Moore's deliberate indifference may have caused the constitutional violation in a "but for" sense, but it did not directly "order" or "authorize" the violation. Where the policymaker's decision does *not* directly "order" or "authorize" the constitutional violation, something more than a single decision is required in order to find that this decision

in fact constitutes "municipal policy," such that we can hold the county liable. Therefore, in my view, Brown failed to establish the constitutional liability of the county on the basis of Sheriff Moore's single decision.[4] Accordingly, I would affirm the district court in all aspects, except that I would reverse as to Bryan County.

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4. I emphasize that it is the *County's constitutional* liability and not *Sheriff Moore's tort* liability that I question. *See DeShaney v. Winnebago County Dep't of Social Servs.*, 489 U.S. 189, 201, 109 S.Ct. 998, 1006, 103 L.Ed.2d 249 (1989) (explaining that Due Process Clause does not constitutionalize "every tort committed by a state actor"); *Collins v. City of Harker Heights*, 503 U.S. 115, 128, 112 S.Ct. 1061, 1070, 117 L.Ed.2d 261 (1992) ("[W]e have previously rejected claims that the Due Process Clause should be interpreted to impose federal duties that are analogous to those traditionally imposed by state tort law." (citations omitted)); *Doe v. Taylor Indep. Sch. Dist.*, 15 F.3d 443, 450 (5th Cir.) (en banc) ("Section 1983 imposes liability for violations of rights protected by the Constitution, not for violations of duties of care arising out of tort law." (quoting *Baker v. McCollan*, 443 U.S. 137, 146, 99 S.Ct. 2689, 2695, 61 L.Ed.2d 433 (1979))), *cert. denied*, __ U.S. __, 115 S.Ct. 70, 130 L.Ed.2d 25 (1994).

APPENDIX C — ORDER AND JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF TEXAS, SHERMAN DIVISION FILED SEPTEMBER 20, 1993

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
SHERMAN DIVISION

NO. 4:91cv229

JILL BROWN

v.

STACY BURNS and THE BOARD OF THE COUNTY COMMISSIONERS OF BRYAN COUNTY, OKLAHOMA

ORDER

On this day came on for consideration Defendants' Motion For Judgment Notwithstanding The Jury Verdict, and the Court having considered the motion and the response thereto, is of the opinion that the motion should be denied. The Court has treated the motion as a motion for judgment as a matter of law in actions tried by a jury pursuant to Rule 50, FED. R. CIV. P.

Defendants argue the following four grounds in support of their motion:

1. There was insufficient evidence to support the submission of the interrogatories to the jury which provided the basis for liability of defendant Bryan County under 42 U.S.C. § 1983.

2. The evidence in this case shows a single incident of arguably negligent hiring from which a single incident involving that same person occurred, when in order to recover under § 1983 plaintiff had to show a persistent and widespread practice of the sheriff of improperly hiring and training reserve deputies.

3. Bryan County is not liable under the Oklahoma Tort Claims Act, Title 51, Chapter 5, Oklahoma Statutes Annotated, because of the exemptions from liability set forth in § 155(5) and (28).

4. Defendant Stacy Burns was entitled to qualified immunity.

The Court will consider defendants' first and second grounds together. It is undisputed from the record in this case that Sheriff B. J. Moore ("Sheriff Moore") was the official policymaker for Bryan County, Oklahoma in the operation of the sheriff's department and the area of law enforcement. Since the holding of the Supreme Court in *Pembaur v. City of Cincinnati*, 106 S.Ct. 1292, 1298 (1986) it is clear that liability may be imposed on a municipality under 42 U.S.C. § 1983 for a single decision by a policymaker. The Fifth Circuit followed the reasoning of the Supreme Court in *Pembaur* to hold that a municipality may be held liable for the illegal or unconstitutional acts of its final policymakers. *Turner v. Upton County, Texas*, 915 F.2d 133, 136 (5th Cir. 1990), *cert. denied* 498 U.S. 1069, 111 S.Ct. 788 (1991). The Fifth Circuit also relied on *Pembaur* in holding that the single decision of a local official who has final policy making authority is the official policy of a municipality upon which liability may rest under 42 U.S.C. § 1983. *Guidry v. Broussard*, 897 F.2d 181, 182 (5th Cir. 1990).

The Court has reviewed the evidence offered by plaintiff and

admitted in this case and is persuaded that the evidence supported the submission of the interrogatories to the jury which support the liability of defendants in this case. Plaintiff produced substantial evidence of defendant Stacy Burns' criminal record and prior conduct which raised an issue as to his suitability to act as a reserve deputy sheriff for Bryan County. This information was either available to Sheriff Moore or could have been easily obtained by the sheriff at the time he selected Stacy Burns to act as a reserve deputy sheriff. Plaintiff also produced evidence that Sheriff Moore made a decision to permit Stacy Burns to work as a reserve deputy sheriff at a driver's license checkpoint with no training or instructions that would equip him to determine if he had a right to pursue plaintiff into Texas and arrest and detain her there under the existing circumstances. The Oklahoma officers only had probable cause to believe that the driver of the automobile in which plaintiff was a passenger had committed misdemeanor offenses. Defendants argue that Stacy Burns was not hired. Whether he was officially hired or not, the county's policymaker selected him as a reserve deputy sheriff and authorized him to work as a reserve deputy sheriff. The evidence submitted by plaintiff supports a finding that Sheriff Moore made a conscious decision, when other alternatives were available, to select Stacy Burns as a reserve deputy sheriff and to allow him to work at the driver's license checkpoint. Plaintiff's evidence raised an issue as to whether there was a need for closer scrutiny of Stacy Burns' background before he was selected as a reserve deputy sheriff and an issue as to whether this need was so obvious and the inadequacy of the scrutiny given was so likely to result in violations of constitutional rights that Sheriff Moore could be reasonably said to have been deliberately indifferent to the constitutional needs of the plaintiff. Plaintiff's evidence also raised an issue as to whether or not, in light of the duties assigned to Stacy Burns, the need for more or different training was so obvious and the inadequacy of training so likely to result in

violations of constitutional rights, Sheriff Moore could be reasonably said to have been deliberately indifferent to the constitutional needs of the plaintiff. In the opinion of the Court, plaintiff's evidence met the necessary requirements for the creation of all of the fact issues necessary to establish municipal liability under *City of Canton, Ohio v. Harris*, 109 S.Ct. 1197 (1989). Plaintiff's evidence also created fact issues as to whether or not the sheriff acted negligently in the selection of Stacy Burns as a reserve deputy sheriff and permitting him to work in that capacity.

The actions of Sheriff Moore in the selection and training of Stacy Burns occurred in Oklahoma. The arrest and detention of plaintiff by Stacy Burns occurred in Texas. Under the principle of comity, Texas courts should give effect to the Oklahoma Tort Claims Act unless the law is contrary to the public policy of Texas. *Lee v. Miller*, 800 F.2d 1372, 1375 (5th Cir. 1986). The Court has determined that the Oklahoma Tort Claims Act is not contrary to the public policy of Texas. The Court must now determine whether the exceptions to liability under the Oklahoma Tort Claims Act claimed by defendants apply in this case. Section 155(5) exempts from liability a loss or claim that results from "performance of or the failure to exercise or perform any act or service which is in the discretion of the state or political subdivision or its employees." This discretionary function exemption is an extremely limited exemption from governmental liability. *Nguyen v. State*, 783 P.2d 962, 964 (Okla. 1990). Oklahoma has adopted the planning operational approach, whereby initial policy or planning decisions are discretionary, and thus exempt, while operational decisions made in the implementation and performance of the policy are ministerial. All discretion is exhausted by the development and adoption of a policy, and all acts thereafter in the implementation of the policy in specific instances are operational. The evidence in this case

shows that the initial formulation of the policy to be followed in the selection of reserve deputy sheriffs and the training to be given reserve deputy sheriffs before placing them on duty at driver's license checkpoints was discretionary, but Sheriff Moore performed a ministerial act when he selected Stacy Burns and when he placed him on duty as a reserve deputy sheriff. These decisions of Sheriff Moore were not decisions based upon balancing competing interests. His actions fall under the operational portions of the test and are not exempt under the discretionary act exemption in § 155(5).

Section 155(28) provides for an exemption from liability under the Oklahoma Torts Claims Act for "[A]cts or omissions done in conformance with then recognized standards." The evidence in this case does not support a finding that the selection of Stacy Burns and the placing him on duty at the driver's license checkpoint was done in conformance with any then current recognized standard. This exemption does not apply to this case.

Defendants' last argument is that defendant Stacy Burns was entitled to qualified immunity. The Court submitted the disputed fact issues as to qualified immunity to the jury. The Court instructed the jury on the law of qualified immunity and the jury found that Stacy Burns was not entitled to qualified immunity.

The jury awarded plaintiff substantial damages in this case, including $36,000 for loss of income in the past and $180,000 for loss of earning capacity in the future. After a review of the evidence in this case, the Court is convinced that there is no legally sufficient evidentiary basis for the award of these damages. Therefore, judgment should be granted for the defendants on plaintiff's claims for loss of income in the past and loss of earning capacity in the future.

For the above reasons, defendants' motion should be denied in part and granted in part. Judgment should be entered for plaintiff in accordance with the jury's verdict, except that plaintiff should recover nothing for loss of income in the past and loss of earning capacity in the future.

IT IS SO ORDERED.

Signed this 20th day of September, 1993.

s/ Paul Brown
UNITED STATES DISTRICT JUDGE

Mld: 9-22-93 to: Kennedy
Sheridan
Hill
Ellis

Appendix C

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
SHERMAN DIVISION

NO. 4:91cv229

JILL BROWN

v.

STACY BURNS and THE BOARD OF THE COUNTY COMMISSIONERS OF BRYAN COUNTY, OKLAHOMA

JUDGMENT ON JURY VERDICT

This action came on for trial before the Court and a jury, the undersigned presiding, and the issues having been duly tried and the jury having duly rendered its verdict,

It is ORDERED and ADJUDGED that the plaintiff, Jill Brown, recover of defendant The Board of the County Commissioners of Bryan County, Oklahoma, and defendant Stacy Burns, jointly and severally, the sum of Seven Hundred Eleven Thousand Three Hundred Two and No/100 Dollars ($711,302.00) as actual damages and the sum of Sixty-Five Thousand and No/100 Dollars ($65,000.00) as attorneys' fees, and from defendant Stacy Burns the sum of Twenty Thousand and No/100 dollars ($20,000.00) as punitive damages, with interest thereon at the rate of 3.43 percent per annum from date of judgment until paid, together with all costs incurred by plaintiff herein, and that plaintiff have execution therefor.

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It is further ORDERED and ADJUDGED that plaintiff, Jill Brown, recover of defendant The Board of the County Commissioners of Bryan County, Oklahoma, and defendant Stacy Burns, jointly and severally, attorneys' fees in the amount of Twelve Thousand Five Hundred and No/100 Dollars ($12,500.00) should this case be appealed to the United States Court of Appeals for the Fifth Circuit, the sum of Five Thousand and No/100 Dollars ($5,000.00) for making or responding to an application for Writ of Certiorari to the Supreme Court of the United States of America, and the sum of Five Thousand and No/100 dollars ($5,000.00) if application for Writ of Certiorari is granted by the Supreme Court of the United States.

Signed this 20th day of September, 1993.

s/ Paul Brown
UNITED STATES DISTRICT JUDGE

Mld 9-22-93 to: Kennedy
Sheridan
Hill
Ellis

APPENDIX D — JURY VERDICT OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF TEXAS, SHERMAN DIVISION DATED APRIL 19, 1993

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
SHERMAN DIVISION

4:91CV229

JILL BROWN

Plaintiff

v.

STACY BURNS, and BRYAN COUNTY, OKLAHOMA

Defendants

Verdict of the Jury

Your verdict will consist of answers to the following questions.

Interrogatory No. 1

Do you find from a preponderance of the evidence that Stacy Burns arrested Jill Brown without probable cause on May 12, 1991?

We do
(Answer "We do" or "We do not")

If you have answered Interrogatory No. 1 "We do," then proceed to Interrogatory No. 2. Otherwise, proceed to Interrogatory No. 3.

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Interrogatory No. 2

Do you find from a preponderance of the evidence that plaintiff's claim for false arrest is barred under the doctrine of qualified immunity as instructed by the Court?

We do not
(Answer "We do" or "We do not")

Proceed to Interrogatory No. 3.

Interrogatory No. 3

Do you find from a preponderance of the evidence that Stacy Burns employed excessive force upon the plaintiff on May 12, 1991?

We do
(Answer "We do" or "We do not")

If you have answered Interrogatory No. 3 "We do," then proceed to Interrogatory No. 4. Otherwise, proceed to Interrogatory No. 5.

Interrogatory No. 4

Do you find from a preponderance of the evidence that plaintiff's claim for excessive force against the defendant Stacy Burns is barred under the doctrine of qualified immunity as instructed by the Court?

We do not
(Answer "We do" or "We do not")

Proceed to Interrogatory No. 5.

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Interrogatory No. 5

Do you find from a preponderance of the evidence that defendant Stacy Burns is liable to the plaintiff for false imprisonment?

We do
(Answer "We do" or "We do not")

If you have answered (1) "We do" to Interrogatory No. 1 and "We do not" to Interrogatory No. 2; (2) "We do" to Interrogatory No. 3 and "We do not" to Interrogatory No. 4; *or* (3) "We do" as to Interrogatory No. 5, then proceed to Interrogatory No. 6. Otherwise proceed no further.

Interrogatory No. 6

Do you find from a preponderance of the evidence that the hiring policy of Bryan County in the case of Stacy Burns, as instituted by its policymaker B.J. Moore, was so inadequate as to amount to deliberate indifference to the constitutional needs of the plaintiff?

We do
(Answer "We do" or "We do not")

Proceed to Interrogatory No. 7.

Interrogatory No. 7

Do you find from a preponderance of the evidence that the training policy of Bryan County in the case of Stacy Burns, as instituted by its policymaker B.J. Moore, was so inadequate as to

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amount to deliberate indifference to the constitutional needs of the plaintiff?

We do
(Answer "We do" or "We do not")

Proceed to Interrogatory No. 8.

Interrogatory No. 8

Do you find from a preponderance of the evidence that Bryan County, acting through Sheriff B.J. Moore, was negligent in the hiring of reserve deputy sheriff Stacy Burns?

We do
(Answer "We do" or "We do not")

Proceed to Interrogatory No. 9.

Interrogatory No. 9

Do you find from a preponderance of the evidence that Bryan County, acting through Sheriff B.J. Moore, was negligent in the training of reserve deputy sheriff Stacy Burns?

We do
(Answer "We do" or "We do not")

Proceed to Interrogatory No. 10.

Interrogatory No. 10

What sum of money, if any, do you find from a preponderance of the evidence would fairly and reasonably compensate the plaintiff for any damages proximately caused by

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the defendant Stacy Burns or the defendant Bryan County acting through its policymaker Sheriff B.J. Moore?

Answer in dollar and cents.

a. Past physical pain	$ *5,000*
b. Future physical pain	$ *10,000*
c. Past mental pain and anguish	$ *1,000*
d. Future mental pain and anguish	$ *1,000*
e. Past physical impairment	$ *75,000*
f. Future physical impairment	$ *360,000*
g. Past disfigurement	$ *1,000*
h. Future disfigurement	$ *2,000*
i. Loss of income in the past	$ *36,000*
j. Loss of earning capacity in the future	$ *180,000*
k. Deprivation of constitutional right not to be subjected to excessive force	$ *50,000*
l. Deprivation of constitutional right for loss of liberty . . .	$ *50,000*
m. Damage to reputation	$ *500*
n. Past medical expenses	$ *65,802*
o. Future medical expenses	$ *90,000*

Proceed to Interrogatory No. 11.

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Interrogatory No. 11

Answer this question if you have answered (1) "We do" to Interrogatory No. 1 and "We do not" to Interrogatory No. 2 *or* (2) "We do" to Interrogatory No. 3 and "We do not" to Interrogatory No. 4.

What is a reasonable fee for the necessary services of plaintiff's attorneys in this case, stated in dollars and cents?

Answer with an amount for each of the following:

a. For preparation and trial.	$ *65,000*
b. For an appeal to the Court of Appeals.	$ *12,500*
c. For making and responding to an application for writ of certiorari to the United States Supreme Court.	$ *5,000*
d. If application for writ of certiorari is granted by the Supreme Court of the United States.	$ *5,000*

Proceed to Interrogatory No. 12.

Interrogatory No. 12

What sum of money, if any, do you find in your discretion should be assessed against the defendant Stacy Burns as exemplary or punitive damages for the constitutional violations suffered by the plaintiff?

Only award punitive or exemplary damages for constitutional violation for false arrest and/or excessive force.

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Answer in dollars and cents, if any.

$ 20,000

Date: 4-19-93

s/ Debbie Reeder
Foreperson

No. 95-1100

In The

Supreme Court of the United States

October Term, 1995

THE BOARD OF THE COUNTY COMMISSIONERS OF BRYAN COUNTY, OKLAHOMA,

Petitioner,

vs.

JILL BROWN,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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35 pp

QUESTIONS PRESENTED

1. Whether complying with a minimum state law requirement for hiring police officers insulates a municipality from § 1983 liability, even though a jury has reasonably decided that a municipal policymaker's particular hiring decision was so inadequate as to amount to deliberate indifference to the constitutional rights of citizens?

2. Whether the jury's conclusion that Bryan County was deliberately indifferent is supported by the facts?

3. Whether, as a matter of law, to establish municipal liability under § 1983, a plaintiff must establish at least two constitutional torts (*i.e.*, two instances of excessive force by a police officer), or two deliberately indifferent hiring decisions by a municipal policymaker, before she can recover for the particular constitutional deprivation she suffered at the hands of a police officer?

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Respondent, Jill Brown, respectfully urges the Court to deny Bryan County's Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

STATEMENT OF THE CASE

This case involves a straightforward application of this Court's § 1983 municipal liability requirements to a County's decision to hire, as a reserve police officer, an individual with a lengthy criminal record showing not only a propensity toward violence, but a callous disregard for the law. The County then put him on the street, provided him with no formal training, and authorized him to make forcible arrests. Not long after being vested with such authority, the officer employed excessive force during an unlawful arrest of Jill Brown, unnecessarily slamming her to the pavement, resulting in severe injuries to her knees which, despite a series of operations, will eventually require total knee replacements. The Fifth Circuit ruled that the evidence supported the jury's verdict finding all elements of § 1983 municipal liability established. *Brown v. Bryan County*, 67 F.3d 1174, 1187 (5th Cir. 1995). Nothing in its opinion remotely raises an issue worthy of certiorari.

In its Petition, Bryan County consistently understates the volume of evidence showing that it acted with deliberate indifference when its undisputed official policymaker on matters of hiring police officers, Sheriff B.J. Moore, decided to employ his nephew, Stacy Burns, to be a reserve officer. At the time Bryan County hired him to be a law enforcement officer, Burns had a lengthy criminal record of arrests and convictions: Assault, Public Drunkenness, Driving While Intoxicated, False Identification, Driving While License Suspended, Resisting Arrest, and nine moving traffic violations. R. Vol. 7, pp. 317-321; R. Vol. 9, pp. 573-577. Sheriff Moore was aware of Burns' lengthy criminal history. R. Vol. 7, pp. 323-324; R. Vol. 9, pp.

648, 672-673. Nevertheless, when Sheriff Moore acquired Burns' rap sheet, he did not read it carefully. R. Vol. 9, pp. 672-673. Moore admitted on cross-examination that he did not notice the assault conviction, did not notice the resisting arrest, did not notice the public drunkenness, and did not notice the false identification. R. Vol. 9, p. 673. While being pressed about his alleged failure to notice these crimes, Moore excused his inattention with the explanation: "He had a long record." R. Vol. 9, p. 673. Sheriff Moore admittedly made no further inquiry into the disposition of any of the charges or convictions, R. Vol. 9, pp. 673-675, and made no attempt to determine whether Burns was currently on probation. R. Vol. 9, p. 674. If he had, he would have discovered that there was an outstanding warrant for Burns' arrest for violating conditions of probation. R. Vol. 7, pp. 319-320, R. Vol. 9, pp. 621-622. Burns not only failed to pay fines and failed to perform community service, he also violated his probation by continuing to commit crimes including the assault, the public drunkenness, the driving while license suspended, and the false identification. R. Vol. 7, pp. 319-320. Despite Sheriff Moore's awareness that Burns had a long criminal record, despite the absence of a background investigation which would have shed additional light on Burns' character, and despite Moore's knowledge that Burns would be making forcible arrests prior to receiving any meaningful training, Moore made the decision to hire Burns, and did so pursuant to his status as the decision-maker for Bryan County. R. Vol. 9, p. 672.

Stacy Burns testified that, prior to beginning work as a reserve officer, he had no experience as a patrol officer. R. Vol. 9, p. 602. Despite that lack of experience, and his criminal history, Bryan County Sheriff's Department provided no formal departmental training to Burns. R. Vol. 9, p. 601. He received no training regarding roadblock procedures, R. Vol. 9, pp. 602, 605, 679-680, no training regarding pursuit across state lines, R. Vol. 9, p. 602, and no training regarding his authority to arrest in

Texas. R. Vol. 9, p. 603. He received no supervision during the incident involving Jill Brown, R. Vol. 9, pp. 603-604, and no instructions during the pursuit. R. Vol. 9, p. 609. Despite this absence of training and experience, Sheriff Moore authorized Burns to make forcible arrests. R. Vol. 9, p. 604. It was just his thirteenth arrest that led to the instant lawsuit. Although both sides introduced conflicting evidence regarding the events immediately preceding and during the traffic stop in which Jill Brown was severely injured, the Fifth Circuit ruled that there was plenty of evidentiary support for the jury's decision to believe the plaintiff's version of the events. 67 F.3d 1174, 1178-81. And Bryan County no longer disputes the jury's determination that Officer Burns deprived Jill Brown of her constitutional rights by subjecting her to excessive force, false arrest, and false imprisonment.[1] Instead, Bryan County is

1. Specifically, Jill Brown testified that she heard two commands to get out of the vehicle, was doing exactly what Burns told her to do, and was not slow to respond. R. Vol. 5, pp. 53-54, 94. After starting to exit the vehicle with her hands in the air, Burns grabbed her by the left arm, spun her around, and threw her to the ground. R. Vol. 5, pp. 52-53. She was not able to break her fall as one hand was in the air and Burns had hold of the other. R. Vol. 5, p. 53. Ms. Brown landed on the pavement, knees first, with Burns' knees in her back. R. Vol. 5, p. 54. She testified that, prior to being thrown to the ground, she was not slow to respond to any commands, did not reach for anything, or do anything that would lead Burns to believe she was reaching for anything. R. Vol. 5, pp. 54-55. (Given Burns' lengthy criminal record, which revealed a disturbing disregard for the law, it is hardly surprising that the jury rejected his version of the events.) As a result of Stacy Burns' actions, Jill Brown has needed four operations, two on each knee, and will require additional surgery. R. Vol. 7, pp. 261, 268.

Moreover, the Fifth Circuit found sufficient evidence to support the jury's additional finding of false arrest and false imprisonment. 67 F.3d at 1180-81. Jill Brown had committed no crime, yet, after being slammed to the pavement, she remained handcuffed there for approximately one hour, during which time she was never informed of the nature of the charges for which she was being detained. *Id.* And no charges were ever brought against her. *Id.* at 1181.

contesting only the County's liability for its employee's constitutional tort.

At trial, Jill Brown established the three elements necessary to demonstrate that Bryan County was sufficiently at fault for its employee's constitutional tort to justify the imposition of § 1983 *municipal* liability: (1) a municipal "policy," pursued with (2) deliberate indifference, which (3) proximately caused the constitutional deprivation. First, Bryan County conceded that Sheriff Moore was the County's official policymaker with exclusive and final policymaking authority regarding the hiring and training of county law enforcement officers including Reserve Officer Burns. R. Vol. 3, pp. 854, 862. Second, the jury's verdict expressly found that the County, through its policymaker on matters of hiring and training, was deliberately indifferent to Jill Brown's constitutional rights, both with respect to the improper hiring and inadequate training of Burns. R. Vol. 10, pp. 823-25. Third, the jury found that Jill Brown's injuries (from the excessive force) were proximately caused by the deliberate indifference of Bryan County's official policymaker.[2] *Id.*

The Fifth Circuit affirmed the jury's verdict of municipal liability, finding that the jury's verdict was supported by the evidence. *Brown v. Bryan County*, 67 F.3d 1174, 1185 (5th Cir. 1995). The Fifth Circuit's affirmance was properly deferential to the jury's resolution of conflicting evidence, and its analysis

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2. The District Court's charge to the jury on municipal liability, at R. Vol. 10, pp. 799-801, mirrored Judge Higginbotham's three-part statement of the law in *Benavides v. Wilson County*, 955 F.2d 968, 972 (5th Cir. 1991) ("In order to prove that a municipal hiring or training policy violated his rights under § 1983, Benavides must show that (1) the training or hiring procedures of the municipality's policymaker were inadequate; (2) the municipality's policymaker was deliberately indifferent in adopting the hiring or training policy; and (3) the inadequate hiring or training policy directly caused the plaintiff's injury.") (*citing City of Canton v. Harris*).

was, accordingly, very fact-intensive. *Id.* at 1178-85. The Fifth Circuit never ruled — in any way — that hiring officers with a misdemeanor record constitutes deliberate indifference as a matter of law; the Fifth Circuit never held that state governmental subdivisions are precluded from hiring any individual with an extensive misdemeanor record; and the Fifth Circuit never created absolute federal minimums for a state's employment of law enforcement officers. *See id.* A fair reading of the Fifth Circuit's opinion reveals that it held only that, based on the particularly egregious evidence presented in this case, the jury could reasonably find that Bryan County's policymaker acted with deliberate indifference when hiring Burns, *id.* at 1183-85, and that such deliberate indifference directly caused the constitutional deprivations (excessive force, unlawful arrest) suffered by Jill Brown. *Id.* at 1185. Thus, Bryan County's Petition not only understates the sheer volume of evidence of municipal fault in this case, but mischaracterizes the Fifth Circuit's opinion as well.

Judge Emilio Garza filed a confusing dissent that simply misunderstands this Court's precedents regarding municipal liability under § 1983. He says one faulty hiring decision, even though made by a municipal policymaker acting with deliberate indifference, cannot be a *Monell* "policy." 67 F.3d at 1185-86 (Garza, E., dissenting). This flies directly in the face of *Pembaur v. Cincinnati*, 475 U.S. 469, 480-81 (1986), where this Court held that a single decision by a policymaker on a matter over which he has policymaking authority constitutes municipal "policy." Judge Garza purports to distinguish between a policy which is itself unconstitutional and a policy which merely results in a state actor's violation of constitutional rights. 67 F.3d at 1186 (Garza, E., dissenting). Yet, this Court, in *City of Canton v. Harris*, 489 U.S. 378, 386-387 (1989), has clearly rejected the argument that the "policy" creating municipal responsibility must itself be unconstitutional. Rather, the "policy" can create

municipal liability, even though it does not expressly order or authorize constitutional deprivations, so long as the § 1983 plaintiff can establish action or inaction on the part of municipal policymakers that is so inadequate as to amount to deliberate indifference to the constitutional rights of citizens, and a close (or "proximate") causal connection between the municipality's deliberate indifference and the constitutional injury. *Id.* at 388-91. Thus, this Court in *Canton* has already considered and resolved the degree of fault required to establish municipal liability when the "policy" is not unconstitutional on its face but merely results in a constitutional deprivation. The injured party must prove that a municipality's policymaker was deliberately indifferent to citizens' constitutional rights, *id.* at 388, 390, and that the deliberately indifferent municipal actions (or inactions) actually caused the constitutional injury. *Id.* at 390-91. There is no requirement that a municipality must be deliberately indifferent to its citizens' constitutional rights at least *twice*, such as by hiring *two* police officers with lengthy criminal records showing a propensity for violence and a general disregard for the law, failing to adequately investigate the backgrounds of *both* despite the "red flag" of the rap sheets, setting *both* of those individuals on the public, and authorizing *both* of them to make forcible arrests prior to providing them any meaningful training.

Bryan County raised this "one tort is not enough" argument — in addition to other equally meritless and long-settled "issues" — in its Petition for Writ of Certiorari, docketed January 10, 1995.

REASONS FOR DENYING THE WRIT

SUMMARY OF ARGUMENT

Bryan County's Petition for Writ of Certiorari suffers three primary defects fatal to its request for certiorari. First, it raises "issues" that have long been resolved, either by Supreme Court precedent or by the express language of § 1983. Second, the only arguably "open" issue raised is one that is so fact-specific as to be jurisprudentially insignificant — whether in this one case the plaintiff produced sufficient evidence of deliberate indifference to support the jury's verdict. Third, Bryan County's Petition repeatedly mischaracterizes portions of the Fifth Circuit's opinion as setting down rigid rules of law that dramatically curtail municipal discretion in hiring police officers; in reality, the Fifth Circuit's opinion merely finds adequate factual support in the record for the jury's resolution of contested issues in favor of § 1983 plaintiff Jill Brown.

Bryan County's "federalism" issue is unworthy of review because § 1983 on its face resolves it. By imposing liability for federal constitutional deprivations caused by persons acting under color of state law, § 1983 expressly mandates the supremacy of the federal constitution over state law. *Every* vindication of constitutional rights pursuant to § 1983 necessarily imposes federal constitutional restraints on state governmental actors. Therefore, Petitioner's suggestion that a state governmental subdivision can insulate itself from § 1983 liability simply by complying with state law is patently foreclosed by the express language of § 1983. Petitioner's "issue" is not only unworthy of certiorari, it is remarkable in its misperception of § 1983.

Petitioner's sufficiency issue (regarding the sufficiency of evidence of Bryan County's deliberate indifference when it hired

Stacy Burns to be a law enforcement officer) is also particularly unworthy of this Court's attention. It is so fact-specific as to be jurisprudentially insignificant; the evidence of deliberate indifference produced at trial was so overwhelming that neither the jury's verdict nor the Fifth Circuit's affirmance can be regarded as ground-breaking; and the jury's verdict of municipal fault was supported also by an alternative finding that Petitioner does not even challenge — a deliberately indifferent failure to train.

The last issue raised by Petitioner is, essentially, whether two wrongs are necessary to constitute municipal fault under § 1983. Petitioner never really commits itself to which of the elements of § 1983 municipal liability requires two wrongs, probably because it cannot seriously be contended that the absence of multiple wrongs is legally fatal to any of those elements. Briefly, those elements are: (1) a municipal "policy," pursued with (2) "deliberate indifference" to the constitutional rights of citizens, which (3) directly causes a constitutional deprivation. *See Monell v. New York Dept. of Social Services*, 436 U.S. 658 (1978); *City of Canton v. Harris*, 489 U.S. 378 (1989). First, it is well-settled that a municipal "policy" can be a single decision by a municipal policymaker, so long as that decision is within his official policymaking authority. *Pembaur v. Cincinnati*, 475 U.S. 469, 480 (1986); *Monell*, 436 U.S. at 694. And Bryan County conceded at trial that Sheriff B.J. Moore was its exclusive official policymaker regarding matters of hiring and training police officers. R. Vol. 3, pp. 854, 862. Second, "deliberate indifference" is simply a culpable mental state (or *mens rea*) with which the municipality, or one of its official policymakers, must act, before liability for a nonpolicymaking employee's constitutional tort can be imputed to the municipality. There is nothing in this Court's § 1983 precedent suggesting that a municipality, or its designated policymaker, must be deliberately indifferent at least *twice* before it can be

found to have acted with the requisite culpable mental state. Third, the risk that Stacy Burns would employ excessive force against a citizen was precisely the risk that made the municipal policymaker's decision to hire him deliberately indifferent. It can hardly be contended, therefore, that Burns' subsequent deprivation of Jill Brown's constitutional rights was somehow so "unforeseeable" that there is not a direct (or proximate) causal connection between the municipal policymaker's deliberately indifferent decision to employ Burns and Burns' subsequent use of excessive force during the unlawful arrest of Jill Brown. And there is no statute, case, or policy that suggests that a municipality must be deliberately indifferent at least twice, or that a municipality's deliberate indifference must cause constitutional torts on at least two separate occasions, in order for the municipality to be regarded as having directly caused a constitutional deprivation. Indeed, such a restriction would constitute arbitrary torture of the doctrine of proximate cause.

In sum, this Court's § 1983 opinions clearly demonstrate that multiple torts are not required to establish any of the three basic elements of municipal liability for a constitutional tort perpetrated by one of its employees. Once a § 1983 plaintiff establishes (1) *municipal action* (*i.e.*, a municipal "policy"); (2) *municipal mental culpability*, or *mens rea* ("deliberate indifference"); and (3) *municipal causation* (a direct causal connection between the deliberately indifferent municipal policy and its employee's constitutional tort), that plaintiff has clearly established *municipal fault* under this Court's well-settled § 1983 precedent. An additional requirement of multiple torts, or multiple incidents of repeated torts, would not only be wholly arbitrary, such a requirement is plainly foreclosed by settled Supreme Court authority. Neither this "one tort is not enough" theory nor any other of Petitioner's "issues" are worthy of this Court's certiorari attention. Bryan County's Petition should, therefore, be denied.

ARGUMENT

I.

IT IS BEYOND DISPUTE THAT COMPLIANCE WITH STATE LAW DOES NOT INSULATE A PERSON (OR MUNICIPALITY) FROM § 1983 LIABILITY. MOREOVER, PETITIONER HAS MISREPRESENTED THE FIFTH CIRCUIT'S HOLDING IN ITS ATTEMPT TO MANUFACTURE A CERT-WORTHY FEDERALISM CONCERN.

A. The Express Language Of § 1983 Settles The "Issue" Of Whether State Governmental Subdivisions Can Avoid Liability Merely By Complying With State Law.

Bryan County's Petition — particularly its "federalism" argument — turns § 1983 on its head. Section 1983 expressly imposes liability for federal constitutional deprivations caused by persons acting under color of state law. And *Monell v. New York City Dept. of Social Services*, 436 U.S. 658 (1978), makes it clear not only that a municipality is a "person" for § 1983 purposes, but also that a municipal "policy" that causes a constitutional deprivation creates municipal liability (so long as the municipality has acted with "deliberate indifference" as later required by *City of Canton v. Harris*, 489 U.S. 378 (1989)). To suggest that a municipality (or any "person") is immune from § 1983 liability simply because its actions are authorized by state law, or not inconsistent with state law, is to nullify not only *Monell*, but § 1983 itself. Indeed, it is the *plaintiff's* burden under § 1983 to establish that a defendant's conduct was taken pursuant to, or under color of, state law. How shocked § 1983 plaintiffs would be to find that, by doing so, they were simultaneously helping their opponents establish a *defense*! It cannot reasonably be disputed that the ability of a § 1983 defendant to set up a defense merely by pleading, "But what I did was consistent with

state law," is plainly foreclosed by the express language of § 1983. Under Bryan County's twisted view of § 1983 and the constitution, a citizen's federal constitutional rights would be subservient to, rather than protected from, state law. A state could protect all of its governmental subdivisions from § 1983 liability simply by passing minimum standards at the state level that govern all of the typical activities that subdivisions perform. Under Bryan County's view, so long as the hiring of a police officer complies with state law minimum requirements — no felony record, a high school diploma — the County is effectively insulated from § 1983 liability. A municipality literally could ignore an applicant's assertions during an interview that, "I want to be a police officer because I like to throw my weight around," or "I love violence," or "I want to rough up some black people," so long as the candidate met the state's generic minimum requirements. Or, as occurred in this case, a municipal policymaker could deliberately close his eyes to abundant evidence of an officer-applicant's propensity to engage in violence and general disregard for the law, so long as the applicant met such generic state minimums. From the time of § 1983's enactment until today, it has been beyond dispute that *state* minimums do not necessarily meet *federal constitutional* minimums. Indeed, § 1983 is expressly designed to address just such disparities.

Recognizing that meeting state minimums does not insulate a municipality from § 1983 liability is not to say that meeting those minimums is wholly irrelevant to *Canton's* "deliberate indifference" requirement. Yet, nowhere does Petitioner contend that it was somehow prevented from putting on evidence of those state law minimums or arguing to the jury that following those minimums showed that there was no "deliberate indifference." The jury's finding of deliberate indifference, however, indicates that the jury — as was its prerogative — was more influenced by the specific evidence surrounding Officer

Burns' particular unfitness for the job of police officer, than by the County's evidence that hiring Burns was not expressly precluded by generic state law minimums. And the Fifth Circuit understandably ruled that the jury's finding was supported by the evidence. *Brown v. Bryan County*, 67 F.3d at 1183-85. In sum, the plain language of § 1983 resolves Petitioner's primary "issue"; this so-called "federalism issue" is, consequently, not an issue at all, much less a cert-worthy one.

B. Bryan County's Petition Repeatedly Mischaracterizes The Fifth Circuit's Holding In An Attempt To Manufacture A Cert-worthy Federalism Issue Out Of Whole Cloth.

Throughout its Petition, apparently in an effort to beef up its federalism argument, Bryan County blatantly misrepresents the Fifth Circuit's opinion. *See* Petition for Writ of Certiorari, at p. 3 (accusing the Fifth Circuit of "fashion(ing) minimum hiring qualifications"), at p. 4 ("the Fifth Circuit has essentially held that the State of Oklahoma does not have the right to employ deputies who have had prior misdemeanor arrests"), at p. 7 ("The Fifth Circuit has crafted a minimum hiring standard"), at p. 10 ("The Fifth Circuit held that Burns was *precluded* from serving as a reserve deputy because of his background of misdemeanor arrests") (emphasis in original), *etc.* An honest reading of the Fifth Circuit's opinion, however, clearly reveals that nowhere did the Fifth Circuit craft minimum federal hiring standards; nowhere did the Fifth Circuit hold that municipalities are precluded from hiring officers with a misdemeanor record; nowhere does the Fifth Circuit state that hiring an officer with a misdemeanor record is deliberate indifference *per se*. *See Brown v. Bryan County*, 67 F.3d 1174 (5th Cir. 1995). All the Fifth Circuit "held" was that the evidence presented in this particular case was sufficient for a jury to conclude that Sheriff Moore's decision to hire Burns amounted to deliberate indifference to the public's constitutional rights. 67 F.3d at 1183-1185. Obviously, that holding is fact-specific, appropriately deferential to the jury,

and in no way erects rigid federal qualifications for state officers that foreclose or "preclude"[3] the hiring of all officers who have once committed misdemeanors. Bryan County's suggestion to the contrary is nothing less than a deliberate misconstruction of the Fifth Circuit's opinion in a desperate attempt to create a certiorari-worthy issue.

II.

THIS COURT SHOULD NOT GRANT CERTIORARI TO REVIEW THE SUFFICIENCY OF EVIDENCE SUPPORTING A JURY'S FINDING THAT A MUNICIPALITY ACTED WITH DELIBERATE INDIFFERENCE IN HIRING A PARTICULARLY UNFIT INDIVIDUAL TO BE A LAW ENFORCEMENT OFFICER.

A. This Issue Is So Case-Specific That It Is Especially Inappropriate For Certiorari.

Petitioner has wholly failed to demonstrate the cert-worthiness of this fact-intensive issue. Indeed, Bryan County's Petition, at pages 15-17, sounds like a jury argument. Apparently, Bryan County is still in denial of the jury's verdict,

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3. Petitioner's strategy is evident in its repeated emphasis on *one word in one footnote* in the Fifth Circuit's opinion — the word "precluded." (*See* Petition, at 7, 10, 11, 13, 14, 15, 18). The plain suggestion of this repeated reference is that the Fifth Circuit somehow held, as a matter of *law*, that hiring a police officer with a misdemeanor record will automatically constitute deliberate indifference. An examination of the offending footnote, however, reveals the true (and *fact*-based) nature of the Fifth Circuit's decision — deference to the jury's finding of deliberate indifference in light of the particularly egregious evidence of Burns' propensity for violence and disregard for the law. 53 F.3d at 1184 n. 20. Indeed, the Fifth Circuit carefully summarized the evidence, concluding that the jury could reasonably have concluded that the County's policymaker, Sheriff Moore, deliberately closed his eyes to his relative's violent background. *Id.* at 1183-85.

given that its heading complains of "The Fifth Circuit's conclusion" rather than "the jury's conclusion." Or perhaps this is merely a continuation of its earlier strategy to dress up a *fact*-based non-issue in cert-worthy (and *law*-based) clothing. In any event, the Fifth Circuit did not conclude that Bryan County was deliberately indifferent, just that the *jury* reasonably could have so concluded. 67 F.3d at 1184. And the Fifth Circuit's affirmance of the jury's verdict is hardly surprising given the overwhelming evidence of deliberate indifference — some of which is referred to in our Statement of the Case, and some of which the Fifth Circuit referred to in upholding the jury's verdict. *Id.* at 1183-85. The Fifth Circuit's affirmance on this point is neither controversial, nor novel, nor far-reaching — and it is decidedly *not* worthy of this Court's attention.

B. Deciding This Insufficiency Issue Would Be Wholly Advisory, As The Jury Finding Of Municipal Fault Also Rested On Alternative Grounds.

Reading Bryan County's Petition, it is easy to forget that the faulty hiring claim was not the only basis of municipal liability; the jury also found that Sheriff Moore (Bryan County's policymaker on matters of both police hiring and training) was deliberately indifferent in failing to adequately *train* Burns prior to putting him on the streets and authorizing him to make forcible arrests. R. Vol. 10, pp. 823-25. Of course, the County's knowledge of Burns' lengthy rap sheet not only supports the jury's finding of liability based on faulty hiring, but also its finding of deliberate indifference in failing to train him.[4] Thus,

4. Bryan County's Petition attempts to slip the training deficiency under the rug, at page 16 of its Petition, when it implies that County awareness of Burns' criminal history was somehow offset by training and supervision. This is not only a mischaracterization of the factual record, but a denial of the jury's alternative finding of County deliberate indifference. Moreover, the Fifth Circuit left the inadequate *training* portion of the verdict both undisturbed and undiscussed, stating early in its discussion, "[f]or efficiency's sake, we will address only those points that we believe merit review." 67 F.3d at 1178.

even if the Court decided to review Petitioner's sufficiency point (regarding the *hiring*), it would be issuing a wholly advisory opinion due to the jury's finding of an alternative basis of municipal liability — a *training* policy of Bryan County, instituted by its policymaker, that was so inadequate as to amount to deliberate indifference to citizens' constitutional rights.

III.

THIS COURT'S § 1983 OPINIONS — AND THE EXPRESS LANGUAGE OF § 1983 — DEMONSTRATE THAT IT IS WELL-SETTLED THAT MUNICIPAL LIABILITY MAY TURN ON A SINGLE DELIBERATELY INDIFFERENT DECISION BY A MUNICIPAL POLICYMAKER THAT CAUSES A SINGLE DEPRIVATION OF CONSTITUTIONAL RIGHTS.

When a municipal employee, such as a police officer, deprives a citizen of her constitutional rights and incurs § 1983 liability, that liability is not automatically imputed to the municipality via a theory of *respondeat superior*. *See Monell*, 436 U.S. 658, 691 (1978). Instead, a § 1983 litigant must clearly demonstrate municipal fault — *i.e.*, municipal responsibility for the constitutional tort committed by its employee. According to this Court's rulings in *Monell*, *Pembaur*, and *Canton*, municipal fault requires (1) a municipal "policy," which includes a decision by a municipal policymaker regarding a matter within his policymaking authority; (2) the municipality's (or its policymaker's) deliberate indifference to citizens' constitutional rights; and (3) a direct causal connection between the municipality's deliberately indifferent "policy" and its employee's deprivation of the plaintiff's constitutional rights. *See Monell*, 436 U.S. at 694; *Pembaur v. Cincinnati*, 475 U.S. 469, 480 (1986); *City of Canton v. Harris*, 489 U.S. 378, 388-91

(1989). These three requirements are hardly mystical — they merely represent the three basic requirements of tort liability: (1) act, (2) mental state, and (3) causation of the injury. The point of this Court's decisions in *Monell* and *Canton* was to assure that those three fundamentals were attributable to the *municipality.* Thus, *Monell*'s "policy" effectively requires a *municipal act; Canton's* "deliberate indifference" standard is the requisite *municipal mental state*; and *Canton's* requirement of a close causal connection between the municipality's deliberately indifferent policy and its employee's subsequent constitutional tort assures *municipal causation.* When these three requirements of municipal fault are established — municipal act, municipal culpable mental state, and municipal causation of the constitutional injury — it is fair to attribute blame for a municipal employee's constitutional tort to the municipality itself. This Court's § 1983 precedent requires plaintiffs to jump no additional hurdles. Indeed, any additional hurdles would be wholly arbitrary.

Nevertheless, Bryan County apparently subscribes to the view that "one constitutional tort is not enough." This view is shared by the dissenting judge on the Fifth Circuit panel, Judge Emilio Garza. This view is "novel" only in the sense that it runs fundamentally counter to the express language of § 1983 and this Court's § 1983 cases. Indeed, the absolute emptiness of this view is revealed by the complete inability of Bryan County to settle on precisely what element of a § 1983 cause of action is missing when a plaintiff proves a municipal deprivation only of *her* constitutional rights and "neglects" to prove that other individuals not party to the litigation had previously suffered similar deprivations. Is it the "policy" that is missing? Is it the "deliberate indifference"? Is it the "direct causal link" between the policy and the constitutional deprivation?[5] The Petitioner's

5. Judge Emilio Garza apparently believes that multiple incidents of constitutional torts perpetrated by municipal employees is necessary to (Cont'd)

refusal to precisely identify the issue and stake out a position on that issue is revealing. Indeed, only by playing this § 1983 "shell game" (policy? deliberate indifference? causation?) is it possible to pretend that the plaintiff's proof in this case is legally insufficient to support municipal liability.

Though Bryan County's Petition is confusing and indecisive, it is possible to distill from its arguments two possible variations of its "one tort is not enough" theory. Petitioners suggest, first, that Bryan County's policymaker must be deliberately indifferent with respect to the hiring of more than one officer before municipal liability can attach; and, second, that the officer must engage in multiple and repeated incidents (of excessive force) depriving citizens of constitutional rights before § 1983 liability can attach to the County. Both positions are plainly foreclosed by settled Supreme Court authority. The

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establish *causation*! *Brown v. Bryan County,* 67 F.3d 1174, 1186 (Garza, E., dissenting). Not only is it illogical to require a municipal defendant to cause two constitutional torts before it can be regarded as causing any, but evidence of causation could not be any stronger than in the present case. A municipality hires an individual, with a lengthy record showing a propensity for violence and a callous disregard for the law, gives that individual a badge, and authorizes him to make forcible arrests prior to any meaningful training and without adequate supervision. In the first two months of his law enforcement career, he subjects a citizen to an unlawful arrest and excessive force. As the Fifth Circuit ruled, there was sufficient evidence for the jury to have found that the municipal policymaker's deliberately indifferent actions directly caused the deprivation of Jill Brown's constitutional rights. 67 F.3d at 1185. Indeed, it would constitute sheer torture of the causation doctrine to regard Burns' unlawful arrest and excessive force as somehow so unforeseeable as to defeat proximate cause. Petitioner attempts to mimic Judge Garza's position, but only reveals its inability to distinguish two separate elements of municipal fault — causation and deliberate indifference. *See* Bryan County's Petition, at "Questions Presented," #2 (referring to "causative link" and "deliberate indifference" as if they are one and the same).

first position requires a definition of *Monell's* "policy" requirement that was expressly rejected in *Pembaur v. Cincinnati*, 475 U.S. 469 (1986); the second position rests not only on a blatant misreading of one out-of-context sentence from *Oklahoma City v. Tuttle*, 471 U.S. 808 (1985), but also constitutes a virtual denial of this Court's ruling in *City of Canton v. Harris*, 489 U.S. 378, 386-387 (1989). Neither position, therefore, raises a contention worthy of this Court's certiorari jurisdiction.

A. It Is Well-Settled That A Single Decision By A Municipal Policymaker, So Long As It Is Made With Deliberate Indifference To The Rights Of Citizens And Causes A Constitutional Deprivation, Is Sufficient To Impose § 1983 Liability.

Petitioner's suggestion that municipal liability for faulty hiring requires the improper hiring of more than one police officer rests on a construction of *Monell's* "policy" requirement that was expressly rejected by this Court in *Pembaur v. Cincinnati*, 475 U.S. 469, 480-481 (1986). The point of *Monell* was to permit municipalities to be sued, but only upon an adequate showing of municipal fault. 436 U.S. 658, 690-94 (1978). Such municipal fault occurs when "execution of a government's policy or custom, whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy, inflicts the injury." *Monell*, 436 U.S. at 694. The Court in *Pembaur* expressly held that municipal liability under *Monell* may be imposed "for *a single decision* by municipal policymakers under appropriate circumstances." 475 U.S. at 480 (emphasis added).[6] Although "official policy" often refers to

6. Judge Emilio Garza, in his Fifth Circuit dissent, seizes on the words, "under appropriate circumstances" and interprets them in a way that is plainly foreclosed by the very same discussion in *Pembaur* in which those words

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formal rules that establish fixed plans of action to be followed under similar circumstances consistently and over time, the Court in *Pembaur* recognized that a government (or a government policymaker) frequently chooses a course of action tailored to a particular situation and not intended to control decisions in later situations. 475 U.S. at 481. According to the Court, "[i]f the decision to adopt that particular course of action is properly made by that government's authorized decisionmakers, it surely represents an act of official government 'policy' as that term is commonly understood." *Id.* Where such "decisions to adopt a particular course of action" are made by those who establish municipal policy, *Monell's* requirement of municipal fault is satisfied because "the municipality is equally responsible whether that action is to be taken only once or to be taken repeatedly." *Id.* To deny compensation to the victim of such municipal fault would, according to *Pembaur*, be contrary to the fundamental purpose of § 1983. *Id.*

Petitioner's confusion may be attributable to a failure to recognize the difference between a *Monell* "policy" and a *Monell* "custom." *Monell* ruled that municipal liability extends beyond those constitutional deprivations caused by a municipal "policy" to those deprivations caused by municipal "customs," even though such a "custom" has not received approval through the municipality's official decision-making channels. *Monell*, at 690-691. Such a "custom" involves "persistent and widespread" practices. *Id.* at 691. But *Monell*'s "custom" alternative for

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appear! As this Court expressly indicated in *Pembaur*, one of those "appropriate circumstances" includes a decision to adopt a particular course of action so long as that decision is made by that government's authorized decisionmakers. 475 U.S. at 481. Such a decision, according to the Court, "surely represents an act of official 'policy' as that term is commonly understood." *Id.*

establishing municipal responsibility for its employees' unconstitutional acts was clearly intended to supplement the "policy" alternative and not restrict it. *See Monell*, at 690-691. Thus, although a plaintiff pursuing municipal liability based on a municipal "custom" must show "persistent and widespread" practices resulting in deprivations of constitutional rights, this Court in *Pembaur* quite clearly ruled that a municipal "policy" is established by a single decision made by a municipal policymaker on a matter within his policymaking authority. 475 U.S. at 480-481. And the § 1983 plaintiff in the present case never argued that Bryan County had a "custom" of hiring persons whose criminal records demonstrated them wholly inadequate to be law enforcement officers. This is a "policy" case, not a "custom" case.[7]

Thus, this Court has already resolved, in *Pembaur*, that municipal liability may follow from a single decision by a policymaker to adopt a particular course of action that is to be taken only one time. 475 U.S. at 481. The plaintiff, of course, in order to comply with *City of Canton v. Harris*, will have to show that the policymaker's course of action was pursued with deliberate indifference to the rights of citizens and, further, that the policymaker's deliberately indifferent course of action caused the constitutional violation. 489 U.S. at 390-391. There is nothing in *Canton*, however, that even remotely suggests that the Court has cut back on *Pembaur*. Neither *Canton* nor any other Supreme Court case requires, as an *element* of proof of § 1983 municipal liability, that the plaintiff prove not only the improper hiring of the officer who violated her rights but, additionally, the improper hiring of some other officer who had nothing

7. And Bryan County plainly conceded in the trial court that Sheriff Moore was its official, exclusive, and final policymaker regarding the hiring and training of law enforcement officers. R. Vol. 3, pp. 854, 862. *See also, Brown v. Bryan County*, 67 F.3d at 1182 n. 17 (Bryan County failed to object to jury instructions which referred to Sheriff Moore as the final policymaker).

whatsoever to do with the particular constitutional deprivation complained of. There is nothing in the language of § 1983 suggesting that defendants must commit two wrongs in order to incur § 1983 liability; there is nothing in *Monell* or its progeny requiring plaintiffs to demonstrate two instances of municipal fault for a municipality to incur liability; and, indeed, there is no policy in the whole of state or federal tort law that suggests that a defendant must be twice faulty (or, here, twice "deliberately indifferent") before a plaintiff can recover for fault-caused injury.[8] The complete absence of either statutory or jurisprudential support for Petitioner's position surely demonstrates that it has not identified an issue worthy of certiorari.

B. It Is Well-Settled That A Single Constitutional Violation, So Long As Caused By The Deliberate Indifference Of A Municipal Policymaker, Is Sufficient To Impose Municipal Liability.

Petitioner's suggestion that the first victim of a constitutional tort cannot recover from a municipality under § 1983 is astounding, and flies directly in the face of § 1983's plain language. Section 1983 authorizes recovery, against those at fault, for a "deprivation" (*singular*). 42 U.S.C. § 1983. And a municipality is at fault for that deprivation so long as the plaintiff meets *Monell's* "policy" requirement, *Canton's* "deliberate indifference" standard, and *Canton's* "causation of constitutional violation" requirement. There is no additional requirement, and Petitioners have pointed to no authority that even arguably engrafts such an artificial barrier to municipal

8. Whether the municipality has adequate notice of a potential employee-perpetrated constitutional tort is certainly not a problem. Indeed, *Canton's* "deliberate indifference" standard is precisely the assurance that the municipality itself is on fair notice. To require a municipality to be deliberately indifferent *twice* before liability could attach would not only denigrate *Canton's* mission but deny its primary source of legitimacy.

liability on top of the already imposing barriers erected in *Monell* and *Canton* to protect municipalities from undeserved liability. This is simply not an open issue, much less a cert-worthy one.

The language in the controlling § 1983 municipal liability cases expressly envisions municipal liability — so long as municipal fault is established in accordance with *Monell* and *Canton* — for a single constitutional violation perpetrated by one of its employees. *See, e.g., Monell*, 436 U.S. at 694 (the government is responsible "when execution of a policy or custom, whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy, inflicts *the injury*" and "this case unquestionably involves official policy as the moving force of *the constitutional violation.*") (emphasis added) and at 691 ("Congress did not intend municipalities to be held liable unless action pursuant to official municipal policy of some nature caused *a constitutional tort.*") (emphasis added); *Canton*, at 389 ("*the constitutional violation*" and "*a constitutional deprivation*"), and at 391 ("deficiency in a city's training program must be closely related to *the ultimate injury.*") (emphasis added); *Oklahoma City v. Tuttle*, 471 U.S. 808, 823 ("there must be an affirmative link between the policy and *the particular violation* alleged") and at 824 (*"the incident," "the constitutional deprivation"*) (emphasis added). All of these references in the singular to "incident," "tort," "violation," "deprivation" and "injury" are surely not an accident.

Not only does all the controlling precedent envision recovery for a single constitutional deprivation, but the plain language of § 1983 could not be any clearer on the point. Section 1983 authorizes recovery, against those at fault for a "deprivation." 42 U.S.C. § 1983. There is no general RICO-style "pattern of deprivations" requirement. Although a plaintiff will need to introduce proof of widespread practices or multiple incidents in a case where her theory of municipal culpability for

those incidents is premised on *Monell's* "custom" alternative, there is no general across-the-board § 1983 requirement of "multiple incidents" applicable to all municipal liability cases, including those premised on municipal "policy" as opposed to municipal "custom." And no Supreme Court case has ever so interpreted § 1983, nor provided even a hint of such a requirement so as to create an open, cert-worthy question. Indeed, placing such an artificial barrier in the path of § 1983 plaintiffs would clearly controvert a controlling principle of statutory construction — *i.e.*, that civil rights remedies, such as § 1983, be broadly and not narrowly construed. *See Monell*, 436 U.S. at 684.

Despite all the preceding (and overwhelming) evidence that § 1983 does not have a multiple unconstitutional incident requirement, Petitioners rely, at p. 6, on Judge Emilio Garza's dissent, which rests on a solitary phrase in *Tuttle* taken wholly out of context. In *Tuttle*, the trial judge's instructions to the jury permitted a finding of municipal liability without any substantial proof of municipal fault. *Tuttle*, 471 U.S. at 821, 824. Rather, the jury instructions in *Tuttle* required proof *only* of the constitutional deprivation (excessive force by a police officer) and permitted the jury to infer from that single incident of excessive force all the other elements of municipal liability — (1) the "policy," such as a decision by a policymaker in charge of police training, (2) the "deliberate indifference" by that policymaker in taking an inadequate course of action in training matters, and (3) the direct causal connection between the deliberately indifferent municipal policy and the municipal employee's constitutional tort. 471 U.S. at 821. If a plaintiff could recover from a municipality merely by introducing proof of an employee's constitutional violation, without more, and have a jury instructed that it could infer each of the remaining elements of municipal liability solely based on evidence of the municipal employee's constitutional tort, the efforts of the Court

in *Monell* (and later in *Canton)* — to set standards for municipal liability that ensure *municipal* fault and not just municipal *employee* fault — would have been in vain. Indeed, if municipal liability can be based only on proof of a single incident of excessive force perpetrated by a municipal employee, *without more — without* proof of any action taken by a municipal policymaker, *without* proof of that policymaker's deliberate indifference, and *without* proof that the policymaker's deliberate indifference caused the constitutional deprivation — municipal liability would virtually be based on *respondeat superior,* which the Court in *Monell* expressly rejected. Thus, the Court in *Tuttle* was simply ensuring the continued vitality of *Monell ;* the Court in no way ruled, or even implied, that § 1983 plaintiffs must, as a matter of law, prove *multiple* incidents involving constitutional violations in order to recover from a municipality. Indeed, the Court in *Tuttle* expressly approved of municipal liability based on a single incident of unconstitutional activity, *if* proof of the single incident is accompanied by proof of the requisite fault on the part of the municipality, and proof *of* the causal connection between the municipal fault and the constitutional deprivation. *Tuttle,* at 824. *Tuttle* in no way adds an additional *element* to a § 1983 plaintiff's burden of establishing municipal liability — *i.e.,* something that must be proved in every case *pro forma,* regardless of how strong a showing the plaintiff otherwise makes of municipal fault for the constitutional deprivation.[9] In sum, the

9. Contrary to Petitioner's attempt, at p. 15 of its Petition, to manufacture a split in the circuits, a quick glance at each of the cases it cites reveals that none of them stand for the remarkable proposition that multiple incidents of employee-perpetrated constitutional torts are required as a matter of law to establish municipal liability even in cases where the § 1983 plaintiff has otherwise clearly established "policy", "deliberate indifference" and "causation". Indeed, the Eleventh Circuit has expressly rejected Petitioner's "multiple incident" theory in *Parker v. Williams,* 862 F.2d 1471, 1480 (11th Cir. 1989) (concluding that the "mere fact alone that this may have been a single incident does not insulate the county from liability"); and the Seventh (Cont'd)

"single incident" phrase in *Tuttle* simply does not bear the load

(Cont'd)
Circuit has implicitly rejected an absolute multiple incident requirement by recognizing that one of the ways a municipal policy can violate an individual's civil rights is when "*the constitutional injury* was caused by a person with final policymaking authority". *McTigue v. City of Chicago,* 630 F.3d 381,382 (7th Cir. 1995) (emphasis added to show the singular use of "injury"). Additionally, each of the cases cited by Petitioner involves gross deficiencies in the proof of at least one of the three fundamental elements of § 1983 municipal liability. In *Hill v. Dekalb Regional Youth Detention Center,* 40 F.3d 1176, 1195-97 (11th Cir. 1994), there was a complete failure of proof of all three elements of municipal liability. The governmental subdivision that was sued — Dekalb County — had transferred control of the detention center to the state prior to the constitutional tort at issue. 40 F.3d at 1195-96. Therefore, there was a complete failure of proof of a Dekalb County "policy" that resulted in the constitutional deprivation. *Id.* at 1196. Because of Dekalb County's complete lack of control of the facility at the time of the tort, there was not only an absence of Dekalb County "policy", there was an attendant lack of a causal connection between any action of Dekalb County and the constitutional injury. Moreover, because the case involved a sexual assault committed by a staff member with *no criminal record,* and because plaintiff did not specifically state how the screening process for hiring staffmembers was flawed, there was simply a failure of proof that any policymakers — Dekalb County's or the state's — had been deliberately indifferent to the potential for sexual violence. *Id.* at 1194. Therefore, given the absence of "policy", the absence of "deliberate indifference", and the absence of "causation", it is hardly surprising that the Court stated that the single incident (sexual assault) could not by itself establish municipal fault. Similarly, in *Hirsch v. Burke,* 40 F.3d 900, 904-905 (7th Cir. 1994), there was a clear failure of proof of deliberate indifference, primarily because of a complete lack of any municipal notice of a potential problem involving police officers' inability to distinguish intoxication from diabetic shock. Indeed, the failure to train allegation in *Hirsch* was so fact-specific (failure to train officers to recognize the difference between intoxication and insulin shock), that it would be practically impossible to prove deliberate indifference in regard to that specific need without some prior similar incident to put policymakers on notice of the potential problem. *See id.,* at 905 (ruling only that notice of a pattern of constitutional violations was required to prove deliberate indifference "in the present context.") Put another way, given the particular circumstances (Cont'd)

that Petitioner attempts to place on it. All it means is that a single incident of excessive force proves only one element of municipal liability — a constitutional deprivation perpetrated by a municipal employee — and does not by itself constitute adequate proof of all the rest of the elements required by this Court to

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(Cont'd)
involved in *Hirsch*, multiple incidents of the particular constitutional deprivation may have been *factually* necessary to prove deliberate indifference; but *Hirsch* cannot and should not be read as requiring a § 1983 plaintiff to prove multiple unconstitutional incidents as a *legal* prerequisite to municipal liability in cases where the plaintiff can readily establish deliberate indifference without pointing to multiple incidents. And in the present case, in stark contrast to *Hirsch*, the risk that the particular employee (Burns) would perpetrate the particular constitutional tort complained of (excessive force) was not so inherently unpredictable that multiple incidents of excessive force were necessary in order to put Bryan County on notice of Burns' proclivity for violence, and thereby demonstrate its deliberate indifference. Indeed, the whole point of *Canton's* deliberate indifference requirement is that it assures "notice" and therefore a fair opportunity for the municipality to avoid liability. The governmental subdivision in *Hirsch*, quite clearly, lacked that opportunity, and therefore could not be regarded as deliberately indifferent. In the present case, however, Bryan County's policymaker quite clearly had a fair opportunity to avoid liability, as there was abundant evidence putting that policymaker on notice of Burns' potential for using excessive force. But, unfortunately, the County's policymaker consciously ignored the "red flags" regarding Burns and clearly demonstrated deliberate indifference. *Brown v. Bryan County*, 67 F.3d 1174, 1183-85 (5th Cir. 1995). In sum, none of the cases cited by Petitioner support Petitioner's contention that proof of multiple constitutional torts by municipal employees is an absolute legal prerequisite to municipal liability in every case. — *i.e.*, that multiple and repeated torts is an additional element of municipal liability that can deprive plaintiffs of recovery even when they, like Jill Brown, have clearly demonstrated *municipal action* ("policy"), *municipal mens rea* ("deliberate indifference") and *municipal causation* (direct causal connection between the municipality's deliberately indifferent policy and its employee's constitutional tort). Because none of the cases cited by Petitioner clearly support the arbitrary doctrine that Petitioner is propounding, there is simply not a circuit split created by the Fifth Circuit's rejection of Petitioner's position.

impute that employee tort to the municipality itself. Only by proving the rest of those elements — "policy," "deliberate indifference," and "causation" — can the constitutional tort be fairly imputed to the municipality. And when a plaintiff, as Jill Brown did, proves each of those elements of municipal fault, *in addition to* the municipal employee's constitutional tort, then municipal liability is certainly not based on *respondeat superior* as the Petitioner argues; rather, this is precisely the showing of municipal fault required by *Monell* and *Canton*. Quite clearly, Jill Brown, unlike the plaintiff in *Tuttle*, adequately proved each of the required elements of § 1983 municipal liability by introducing evidence of municipal fault far more extensive than just a municipal employee's use of excessive force.[10]

In sum, neither § 1983 nor any Supreme Court case discussing § 1983 municipal liability requires a plaintiff to demonstrate either (1) that the municipality be at fault for the improper hiring of more than one police officer, or (2) that the municipal fault must lead to more than one incident involving the deprivation of constitutional rights. Petitioner's position would mean that a plaintiff could not recover from a municipality even though she has demonstrated *municipal action* (hiring and training decisions by a municipal policymaker regarding a

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10. A thorough review of the trial record, or of the Fifth Circuit's careful analysis thereof, reveals that, unlike *Tuttle*, the plaintiff submitted abundant proof of a municipal "policy" — *i.e.*, a grossly inadequate hiring decision made by the official municipal policymaker in charge of hiring police officers. *Brown v. Bryan County*, 67 F.3d 1174, 1182-85 (5th Cir. 1995). Unlike *Tuttle*, the plaintiff submitted abundant proof of the policymaker's culpable mental state (*Canton's* "deliberate indifference"). *Id.* at 1183-85. Unlike *Tuttle*, the plaintiff submitted abundant proof that the policymaker's deliberate indifference directly caused the constitutional deprivation. *Id.* And, unlike *Tuttle*, the judge's instructions to the jury in no way permitted the jury to infer the existence of all those elements of municipal liability solely from the incident involving Burns' excessive force against Jill Brown. R. Vol. 10, pp. 799-801.

matter over which he has official policymaking authority), *municipal mens rea* (a hiring and training policymaker's deliberate indifference in choosing an inadequate hiring or training course of action), *municipal causation* (a close causal relationship between the municipal policymaker's deliberately indifferent failure to properly hire or adequately train and the officer's subsequent deprivation of a citizen's constitutional rights) and *injury* (the constitutional deprivation itself, such as a police officer's unconstitutional use of "excessive force"). Under Petitioner's view, municipalities could, through the actions of a designated policymaker, knowingly put a "time bomb" on the streets with a badge, and a citizen injured when that "time bomb" goes off could not recover from the municipality, so long as the municipal policymaker put only one "time bomb" on the street, *or* so long as the "time bomb" has exploded only once.[11] Placing such artificial restrictions on a plaintiff's ability to recover for tort — when she has shown a *municipal act* (*i.e.*, "policy"), *municipal mental culpability*, and *municipal causation of the constitutional injury* — would certainly constitute perplexing policy, and is distinctly not required by the law of § 1983. As previously demonstrated in this brief, the Fifth Circuit properly ruled that Jill Brown produced sufficient evidence in support of all the legal hurdles placed in her path — *municipal action* (actions, decisions, inactions of a "policymaker" with final policymaking authority regarding hiring and training), *municipal mental culpability* (deliberate indifference of the policymaker in choosing an inadequate course of action respecting the hiring and training of Officer Burns), and *municipal causation of plaintiff's constitutional injury* (a close, or "proximate," causal connection between the

11. Or, a school district could knowingly employ a janitor with a record of child sexual assaults, and a child later victimized could not recover from the school district, so long as the district hired only one such janitor *or* so long as the child was the janitor's first victim subsequent to the school district's decision to hire him.

municipal fault in improperly hiring Burns and inadequately training Burns, and Burns' subsequent and highly foreseeable deprivation of Jill Brown's constitutional rights by subjecting her to excessive force, false arrest, and false imprisonment). Nothing further is required. Indeed, any further requirement would not only be wholly arbitrary, but is plainly foreclosed by settled Supreme Court authority. There is simply not a cert-worthy issue to be found in Petitioner's "one tort is not enough" claims.

CONCLUSION

For all the foregoing reasons, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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No. 95-1100

In The

Supreme Court of the United States

October Term, 1995

THE BOARD OF THE COUNTY COMMISSIONERS OF BRYAN COUNTY, OKLAHOMA,

Petitioner,

vs.

JILL BROWN, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

JOINT APPENDIX

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PETITION FOR CERTIORARI FILED JANUARY 5, 1996
CERTIORARI GRANTED APRIL 22, 1996

TABLE OF CONTENTS

RELEVANT DOCKET ENTRIES

11/22/91	Original Complaint filed (bhs)
11/22/91	Summons(es) issued for Bryan County, OK, Bryan Cty Sheriff, B J Moore, Stacy Burns, Robert Morrison (bhs)
11/22/91	Filing Fee Paid; FILING FEE $120 RECEIPT #52465 (bhs)
11/25/91	Demand for jury trial by Jill Brown (bhs)
12/9/91	Order, authorizing service of process (signed by Judge Paul Brown) cc: atty on 12-9-91 (bhs)
12/10/91	Return of service executed as to Robert Morrison 12/9/91 Answer due on 12/30/91 for Robert Morrison (bhs) [Entry date 12/11/91]
12/10/91	Return of service executed as to Bryan Cty Sheriff 12/9/91 Answer due on 12/30/91 for Bryan Cty Sheriff (bhs) [Entry date 12/11/91]
12/10/91	Return of service executed as to Bryan County, OK 12/9/91 Answer due on 12/30/91 for Bryan County, OK (bhs) [Entry date 12/11/91]
12/10/91	Return of service executed as to B J Moore 12/9/91 Answer due on 12/30/91 for B J Moore (bhs) [Entry date 12/11/91]
12/20/91	Answer to Original Complaint by Stacy Burns (bhs)
12/27/91	Order requiring proposal for contents of scheduling order, set notice of compliance due

	for 1/23/92 (signed by Judge Paul Brown) s/12-26-91 cc: attys on 1-2-92 (bhs) [Entry date 01/02/92]
12/30/91	Answer to Original Complaint by B J Moore, Robert Morrison (bhs) [Entry date 01/02/92]
12/31/91	Amended Answer to Original Complaint by B J Moore, Robert Morrison: amends [10-1] answer (bhs) [Entry date 01/02/92]
1/16/92	Memorandum by Bryan County, OK, Bryan Cty Sheriff, B J Moore, Robert Morrison to dismiss (bhs)
1/16/92	Memorandum by Bryan County, OK, Bryan Cty Sheriff, B J Moore, Robert Morrison in support of [12-1] motion to dismiss (bhs)
1/23/92	Joint proposal for contents of scheduling order (bhs)
1/24/92	Motion by Jill Brown to amend [1-1] complaint (bhs) [Entry date 01/27/92]
1/24/92	Response by Jill Brown to [12-1] motion to dismiss (bhs) [Entry date 01/27/92]
2/3/92	Return of service executed as to Stacy Burns on 12/13/91 by personal service. Answer due on 1/2/92 for Stacy Burns (bhs) [Entry date 02/04/92]
2/5/92	Order granting [15-1] motion to amend [1-1] complaint, set amend, join, implead parties by 2/10/92 (signed by Judge Paul Brown) cc: attys on 2-5-92 (bhs)

2/7/92	Amended complaint by Jill Brown, (Answer due 2/18/92 for Robert Morrison, for Stacy Burns, for B J Moore, for Bryan Cty Sheriff, for Bryan County, OK) amending [1-1] complaint (bhs)
2/12/92	Scheduling order setting Amend, join, implead, parties by 5:00 3/16/92; Pla to file mo to amend by 5:00 6/1/92; Dft to file mo to amend by 5:00 6/15/92; Deadline for filing of all pre-trial motions 5:00 7/1/92; Discovery cutoff 5/15/92; Pretrial order to be submitted on or before 5:00 8/3/92; Requested jury instructions by 5:00 8/3/92 for Robert Morrison, for Stacy Burns, for B J Moore, for Bryan Cty Sheriff, for Bryan County, OK, for Jill Brown; Final Pretrial conference on 9:00 9/25/92; Expert witness list by 4/15/92 for all defendants and for Jill Brown; Jury trial on 9:00 10/5/92; (signed by Judge Paul Brown) cc: attys on 2-12-92 (bhs)
2/25/92	Order granting in part, denying in part [12-1] motion to dismiss & Bryan Cty Sheriff's Dept is dismissed and all causes of action brought agnst dfts Morris and B.J. Moore, except the federal cause of action brought pursuant to 42 USC 1983. OB Ref: v63 p88 (signed by Judge Paul Brown) cc: attys on 2-26-92 (bhs) [Entry date 02/26/92]
3/9/92	Notice of attorney appearance for Bryan County, OK, B J Moore, Robert Morrison by Jack G Kennedy (bhs) [Entry date 3/10/92]
4/15/92	Witness list filed by Bryan County, OK, B J Moore, Stacy Burns, Robert Morrison (bhs)
4/15/92	Witness list filed by Jill Brown (bhs)

5/5/92	HOTLINE CONFERENCE: by Magistrate Judge Harry W. McKee (exr) [Entry date 02/01/93]
5/8/92	Order that pla experts shall not be permitted to attend deposition of dfts experts (signed by Magistrate Judge Harry W. McKee) s/5-6-92 cc: attys on 5-8-92 (bhs)
5/20/92	Joint motion by Jill Brown, Bryan County, OK, B J Moore, Stacy Burns, Robert Morrison to amend [19-1] Scheduling order (bhs)
5/21/92	Amended Scheduling order setting Deadline for filing of all pre-trial motions 5:00 7/1/92; Pla to file mo to amend by 5:00 6/1/92; Dft to file mo to amend by 5:00 6/15/92; Discovery cutoff 7/15/92; Pretrial order to be submitted on or before 5:00 8/3/92; Requested jury instructions by 5:00 8/3/92 for Robert Morrison, for Stacy Burns, for B J Moore, for Bryan County, OK, for Jill Brown Final Pretrial conference on 9:00 9/25/92; Jury trial on 9:00 10/5/92; (signed by Judge Paul Brown) cc: attys on 5-22-92 (bhs) [Entry date 05/22/92]
5/21/92	Terminated document #25 (bhs) [Entry date 05/22/92]
6/1/92	Motion by Jill Brown to amend [1-1] complaint (bhs) [Entry date 06/02/92]
6/15/92	Notice of attorney appearance for Stacy Burns by Jack G Kennedy (bhs)
6/15/92	Motion by B J Moore, Robert Morrison to dismiss cross-claim (bhs)

6/15/92	Motion by B J Moore, Stacy Burns, Robert Morrison for leave to file amended answer (bhs)
6/15/92	Notice by Jill Brown to take deposition of Oklahoma DPS on 6-24-92 at 11:45 am in Okla City, OK (bhs) [entry date 06/16/92]
6/15/92	Notice by Jill Brown to take deposition of Oklahoma State Bureau of Investigations on 6-24-92 at 12:15 am in Okla City, OK (bhs) [Entry date 06/16/92]
6/15/92	Notice by Jill Brown to take deposition of Okla Council of Law Enforcement Education and Training on 6-24-92 at 9:00 am in Okla City, OK (bhs) [Entry date 06/16/92]
6/19/92	Order granting [27-1] motion to amend [1-1] complaint, reset amend, join, implead parties by 5:00 6/24/92 (signed by Judge Paul Brown) cc: attys on 6-19-92 (bhs)
6/19/92	Order granting [30-1] motion for leave to file amended answer (signed by Judge Paul Brown) cc: attys on 6-19-92 (bhs)
6/22/92	Second Amended complaint by Jill Brown, (Answer due 7/2/92 for Robert Morrison, for Stacy Burns, for B J Moore, for Bryan County, OK) amending [1-1] complaint (bhs)
6/29/92	Second Amended Answer to Original Complaint by Bryan County, OK (bhs) [Entry date 06/30/92]
6/29/92	Amended Answer to Original Complaint by

	Stacy Burns: amends [8-1] answer (bhs) [Entry date 06/30/92]
6/29/92	Amended Answer to Original Complaint by B J Moore: amends [10-1] answer (bhs) [Entry date 06/30/92]
6/29/92	Second Amended Answer to Original Complaint by Robert Morrison: amends [10-1] answer (bhs) [Entry date 06/30/92]
7/1/92	Motion by Robert Morrison for summary judgment. (bhs) [Entry date 07/02/92]
7/1/92	Motion by B J Moore for summary judgment. (bhs) [Entry date 07/02/92]
7/1/92	Motion by Bryan County, OK for summary judgment. (bhs) [Entry date 07/02/92]
7/1/92	Motion by Stacy Burns for summary judgment. (bhs) [Entry date 07/02/92]
7/10/92	Order granting [29-1] motion to dismiss cross-claim filed by dfts Morrison and Moore agnst dft Burns in original answer (signed by Judge Paul Brown) s/7-9-92 cc: attys on 7-10-92 (bhs)
7/13/92	Motion by Jill Brown to extend time to respond to mo for summary jgm. Added attorney John Kermit Hill. (bhs) [Entry date 07/14/92]
7/13/92	Motion by Jill Brown to extend time to respond to mo for summary jgm of Board of Commissioners. (bhs) [Entry date 07/14/92]

7/13/92	Motion by Jill Brown to extend time to respond to mo for summary jgm of Stacy Burns. (bhs) [Entry date 07/14/92]
7/13/92	Motion by Jill Brown to extend time to respond to mo for summary jgm of Robert Morrison. (bhs) [Entry date 07/14/92]
7/14/92	First supplement to Witness list filed by Jill Brown (bhs)
7/15/92	Order granting [46-1] motion to extend time to respond to mo for summary jgm, Response to motion reset to 8/12/92 for [42-1] motion for summary judgment (signed by Judge Paul Brown) cc: attys on 7-16-92 (bhs) [Entry date 07/16/92]
7/16/92	Order granting [48-1] motion to extend time to respond to mo for summary jgm of Stacy Burns, Response to motion to 8/12/92 for [44-1] motion for summary judgment (by Judge Paul Brown) s/7-15-92 cc: attys on 7-16-92 (bhs)
7/16/92	Order granting [47-1] motion to extend time to respond to mo for summary jgm of Board of Commissioners, Response to motion reset to 8/12/92 for [43-1] motion for summary judgment (signed by Judge Paul Brown) s/7-15-92 cc: attys on 7-16-92 (bhs)
7/16/92	Order granting [49-1] motion to extend time to respond to mo for summary jgm of Robert Morrison, Response to motion reset to 8/12/92 for [41-1] motion for summary judgment (signed by Judge Paul Brown) s/7-15-92 cc: attys on 7-16-92 (bhs)

8/3/92	Joint Pretrial order filed (bhs) [Entry date 08/04/92]
8/3/92	Proposed Jury instruction by Jill Brown (bhs) [Entry date 08/04/92]
8/3/92	Proposed Jury instructions by Bryan County, OK, B J Moore, Stacy Burns, Robert Morrison (bhs) [Entry date 08/04/92]
8/12/92	Motion by Jill Brown to extend time to respond to B J Moore's mo for summary jgm. Added attorney John Delane Hill. (bhs) [Entry date 08/13/92]
8/12/92	Motion by Jill Brown to extend time to respond to Stacy Burns's mo for summary jgm. (bhs) [Entry date 08/13/92]
8/12/92	Motion by Jill Brown to extend time to respond to Bryan Cty Commissioners mo for summary jgm. (bhs) [Entry date 08/13/92]
8/12/92	Motion by Jill Brown to extend time to respond to Robert Morrison's mo for summary jgm. (bhs) [Entry date 08/13/92]
8/12/92	Motion by Jill Brown to continue trial (bhs) [Entry date 08/13/92]
8/12/92	Motion by Jill Brown to amend [1-1] complaint (bhs) [Entry date 08/13/92]
8/12/92	Response by Jill Brown to [42-1] motion for summary judgment (bhs) [Entry date 08/13/92]

8/12/92	Response by Jill Brown to [44-1] motion for summary judgment (bhs) [Entry date 08/13/92]
8/12/92	Response by Jill Brown to [43-1] motion for summary judgment (bhs) [Entry date 08/13/92]
8/12/92	Response by Jill Brown to [41-1] motion for summary judgment (bhs) [Entry date 08/13/92]
8/14/92	Order granting [58-1] motion to extend time to respond to B J Moore's mo for summary jgm, Response to motion reset to 8/22/92 for [42-1] motion for summary judgment (signed by Judge Paul Brown) s/8-13-92 cc: attys on 8-14-92 (bhs)
8/14/92	Order granting [59-1] motion to extend time to respond to Stacy Burns's mo for summary jgm, Response to motion reset to 8/22/92 for [44-1] motion for summary judgment (signed by Judge Paul Brown) s/8-13-92 cc: attys on 8-14-92 (bhs)
8/14/92	Order granting [60-1] motion to extend time to respond to Bryan Cty Commissioners mo for summary jgm, Response to motion reset to 8/22/92 for [43-1] motion for summary judgment (signed by Judge Paul Brown) s/8-13-92 cc: attys on 8-14-92 (bhs)
8/14/92	Order granting [61-1] motion to extend time to respond to Robert Morrison's mo for summary jgm, Response to motion reset to 8/22/92 for [41-1] motion for summary judgment (signed by Judge Paul Brown) s/8-13-92 cc: attys on 8-14-92 (bhs)

8/24/92	Response by Jill Brown to [43-1] motion for summary judgment of Bryan County (bhs) [Entry date 08/25/92]
8/24/92	Response by Jill Brown to [41-1] motion for summary judgment of Robert Morrison (bhs) [Entry date 08/25/92]
8/24/92	Response by Jill Brown to [44-1] motion for summary judgment of Stacy Burns (bhs) [Entry date 08/25/92]
8/24/92	Response by Jill Brown to [42-1] motion for summary judgment of B J Moore (bhs) [Entry date 08/25/92]
9/4/92	Order granting [62-1] motion to continue trial, reset pretrial conference for 9:00 3/26/93, reset Jury trial for 9:00 4/12/93 (signed by Judge Paul Brown) s/9-3-92 cc: attys on 9-4-92 (bhs)
9/4/92	Order granting [63-1] motion to amend [1-1] complaint (signed by Judge Paul Brown) s/9-3-92 cc: attys on 9-4-92 (bhs)
9/9/92	Motion by Bryan County, OK, B J Moore, Stacy Burns, Robert Morrison for leave to file motion for reconsideration (bhs) [Entry date 09/10/92]
9/9/92	Amended complaint by Jill Brown, (Answer due 9/21/92 for Robert Morrison, for Stacy Burns, for B J Moore, for Bryan County, OK) amending [1-1] complaint (bhs) [Entry date 09/10/92]
9/21/92	Order granting [78-1] motion for leave to file

	motion for reconsideration (signed by Judge Paul Brown) cc: attys on 9-21-92 (bhs)
9/21/92	Motion by Bryan County, OK, Bryan Cty Sheriff, B J Moore, Stacy Burns, Robert Morrison for reconsideration of [77-1] order (bhs)
11/2/92	Order granting [81-1] motion for reconsideration of [77-1] order, Response to motion, set notice of complaince due for 11/12/92 (signed by Judge Paul Brown) cc: attys on 11-3-92 (bhs) [Entry date 11/03/92]
11/9/92	Response by Bryan County, OK, B J Moore, Stacy Burns, Robert Morrison to [63-1] motion to amend [1-1] complaint (tm) [Entry date 11/10/92]
11/12/92	Order denying [81-1] motion for reconsideration of [77-1] order. Ct will consider dfts response for purposes of evaluating motions for summary judgment (signed by Judge Paul Brown) cc: attys on 11-12-92 (bhs)
11/13/92	Order that Ct will determine motions to summary judgment on or after 11-23-92 and set, Response to motion reset to 11/23/92 for [44-1] motion for summary judgment, reset to 11/23/92 for [43-1] motion for summary judgment, reset to 11/23/92 for [42-1] motion for summary judgment, reset to 11/23/92 for [41-1] motion for summary judgment (signed by Judge Paul Brown) s/11-12-92 cc: attys on 11-13-92 (bhs)

11/20/92	Supplemental response in support of response to [42-1] motion for summary judgment of B J Moore by plaintiff Jill Brown (bhs) [Entry date 11/23/92]
11/20/92	Supplemental response in support of brief in opposition to [44-1] motion for summary judgment of Stacy Burns by plaintiff Jill Brown (bhs) [Entry date 11/23/92]
11/20/92	Supplemental response in support of brief in opposition to [42-1] motion for summary judgment of B J Moore by plaintiff Jill Brown (bhs) [Entry date 11/23/92]
11/20/92	Supplemental response in support of brief in opposition to [43-1] motion for summary judgment of Bryan County by plaintiff Jill Brown (bhs) [Entry date 11/23/92]
11/20/92	Supplemental response in support of brief in opposition to [41-1] motion for summary judgment of Robert Morrison by plaintiff Jill Brown (bhs) [Entry date 11/23/92]
11/20/92	Supplemental response in support of response to [41-1] motion for summary judgment of Robert Morrison by plaintiff Jill Brown (bhs) [Entry date 11/23/92]
11/20/92	Supplemental response in support of response to [44-1] motion for summary judgment of Stacy Burns by plaintiff Jill Brown (bhs) [Entry date 11/23/92]

12/9/92	Order denying [44-1] motion for summary judgment, denying [43-1] motion for summary judgment, granting [42-1] motion for summary judgment, granting [41-1] motion for summary judgment and dismissing all claims against Robert Morrison and B J Moore; dismissing cruel punishment claim against Burns but 1983 claims for false arrest and false imprisonment and emotional distress are not dismissed; 1983 claims for inadequate hiring and training against Bryan County are not dismissed OB Ref: v66 p105 (signed by Judge Paul Brown) cc: attys on 12-10-92 (bhs) [Entry date 12/10/92]
12/11/92	Order dismissing intentional infliction of emotional distress claim OB Ref: v66 p111 (signed by Judge Paul Brown) s/12-10-92 cc: attys on 12-11-92 (bhs)
1/29/93	Motion by Jill Brown for leave to file supplemental responses to dfts interr and request for production of documents (bhs)
2/9/93	Order granting [95-1] motion for leave to file supplemental responses to dfts interr and request for production of documents (signed by Judge Paul Brown) cc: attys on 2-9-93 (bhs)
2/9/93	Fifth Supplemental Response by Jill Brown to dfts interrogatories (bhs)
2/9/93	Third supplemental Response by Jill Brown to dfts request for production of documents (bhs)
2/26/93	Motion by Jill Brown for leave to file plaintiff's second supplement to designation of expert witnesses (tm) [Entry date 03/01/93]

2/26/93	Motion by Jill Brown for leave to file plaintiff's sixth supplemental response to deft's interrogatories (tm) [Entry date 03/01/93]
3/2/93	Order granting [99-1] motion for leave to file plaintiff's second supplement to designation of expert witnesses (signed by Judge Paul Brown) cc: attys on 3-3-93 (bhs) [Entry date 03/03/93]
3/2/93	Order granting [100-1] motion for leave to file plaintiff's sixth supplemental response to deft's interrogatories (signed by Judge Paul Brown) cc: attys on 3-3-93 (bhs) [Entry date 03/03/93]
3/2/93	Second supplement to designation of expert witnesses of pla (bhs) [Entry date 03/03/93]
3/2/93	Response by Jill Brown to sixth supplemental response to dfts interrogatories (bhs) [Entry date 03/03/93]
3/26/93	Motion by Stacy Burns, Bryan County, OK to amend [55-1] pre-trial order (bhs)
3/26/93	Pretrial order filed (signed by Judge Paul Brown) (bhs)
3/26/93	Final Pre-trial conference held, jury selection on April 12 as scheduled (sxh) [Entry date 03/29/93]
4/7/93	Response by Jill Brown to [105-1] motion to amend [55-1] pre-trial order (sxs) [Entry date 04/08/93]
4/8/93	Order denying [105-1] motion to amend [55-1]

	pre-trial order (signed by Judge Paul Brown) cc: attys on 4-12-93 (bhs) [Entry date 04/12/93]
4/12/93	Motion by Jill Brown in limine (sxh)
4/12/93	Motion by Robert Morrison, Stacy Burns, Bryan County, OK in limine (sxh)
4/12/93	Jury selection held (sxh)
4/12/93	Jury voir dire held before Judge Paul Brown (sxh)
4/12/93	Oral order granting [109-1] motion in limine granting [108-1] motion in limine from the bench signed by Judge Paul Brown (sxh) [Entry date 04/13/93]
4/12/93	Jury trial held — Day 1 (sxh) [Entry date 04/13/93]
4/13/93	Jury trial held — Day 2 — Pla rest, dft begins case in chief (sxh)
4/14/93	Jury trial held — Day 3. Parties close. (sxh)
4/14/93	Witness list filed by Jill Brown (sxh) [Edit date 04/20/93]
4/14/93	Exhibit list by Jill Brown (sxh) [Edit date 04/20/93]
4/14/93	Witness list filed by Stacy Burns, Bryan County, OK (sxh) [Edit date 04/20/93]
4/14/93	Exhibit list filed by Stacy Burns, Bryan County, OK (sxh) [Edit date 04/20/93]

4/19/93	Jury note #1 filed (sxh) [Entry date 04/20/93]
4/19/93	Jury verdict for Jill Brown (sxh) [Entry date 04/20/93]
4/19/93	Minutes Re: [0-0] Jury trial by Judge Paul Brown on 4/12/93 through 4/19/93 (sxh) [Entry date 04/20/93]
5/7/93	Motion by Stacy Burns, Bryan County, OK for judgment notwithstanding the jury verdict (bhs)
5/7/93	Memorandum by Stacy Burns, Bryan County, OK in support of [117-1] motion for judgment notwithstanding the jury verdict (bhs)
5/17/93	Response by Jill Brown to [117-1] motion for judgment notwithstanding the jury verdict (bhs) [Entry date 05/18/93]
5/17/93	Memorandum by Jill Brown in support of [119-1] motion response (bhs) [Entry date 05/18/93]
6/20/93	Partial Transcript filed of trial on April 13, 1993 before Judge Paul Brown (sxs) [Entry date 06/23/93]
7/21/93	Transcript filed (6 Volumes) of trial 4-12-93 thru 4-19-93 (bhs)
9/21/93	Order granting in part, denying in part [117-1] motion for judgment notwithstanding the jury verdict and pla should recover nothing for loss of income OB Ref: v69 p104 (signed by Judge Paul Brown) s/9-20-93 cc: attys on 9-22-93 (bhs) [Entry date 09/22/93]

9/21/93	Judgment on jury verdict for Jill Brown against Stacy Burns, Bryan County, and pla to recover $711,302 actual damages and $65,000. attys fees and $20,000 punitive damages OK. OB Ref: v69 p105 (signed by Judge Paul Brown) s/9-20-93 cc: attys on 9-22-93 (bhs) [Entry date 09/22/93]
9/22/93	Case closed (bhs)
10/4/93	Post judgment motions under rules 50 and 56 of Bryan County and Stacy Burns (bhs) [Entry date 10/05/93]
10/4/93	Notice of appeal by Stacy Burns, Bryan County, OK Fee Status: pd (notice of appeal and docket sheet sent to Fifth Circuit) Appeal record due on 11/3/93 (bhs) [Entry date 10/05/93]
10/4/93	Motion by Stacy Burns, Bryan County, OK to stay pending disposition of motions after entry of judgment (bhs) [Entry date 10/05/93]
10/4/93	Motion by Stacy Burns, Bryan County, OK to stay pending appeal (bhs) [Entry date 10/05/93]
10/5/93	USCA appeal fee: $105.00 #60377 [126-1] appeal (bhs)
10/14/93	Response by Jill Brown to [128-1] motion to stay pending appeal, [127-1] motion to stay pending disposition of motions after entry of judgment (bhs) [Entry date 10/15/93]
10/14/93	Notice of appeal by Jill Brown Fee Status: pd (notice of appeal and docket sheet sent to Fifth

	Circuit) Appeal record due on 11/15/93 (bhs) [Entry date 10/15/93]
10/14/93	USCA appeal fee: $105.00 #60399 [130-1] appeal (bhs) [Entry date 10/15/93]
10/20/93	Notice of Docketing ROA from USCA Re: 126-1] appeal USCA NUMBER: 93-5376 (bhs)
10/27/93	Order denying [125-1] post-judgment motions under Rules 50 and 59 (signed by Judge Paul Brown) s/10-26-93 cc: attys on 10-27-93 (bhs)
10/28/93	Certified and transmitted record on appeal to U.S. Court of Appeals: [130-1] appeal, [126-1] appeal (bhs)
10/28/93	Terminated document (bhs)

Separately marked instruments included in record on appeal — No I thru III

Transcripts — No IV thru X

1 Folder of exhibits

ORDER OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF TEXAS, SHERMAN DIVISION FILED DECEMBER 9, 1992

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
SHERMAN DIVISION

4:91cv229

JILL BROWN

Plaintiff

v.

STACY BURNS, ROBERT MORRISON, B.J. MOORE, THE BOARD OF THE COUNTY COMMISSIONERS OF BRYAN COUNTY,

Defendants.

ORDER

On this day came on for consideration Defendants' Motion for Summary Judgment,[1] and the Court having considered the same and the response, is of the opinion that 1) all the claims against Robert Morrison should be dismissed; 2) that all claims against Sheriff B.J. Moore should be dismissed; 3) that the cruel and unusual punishment claim against Stacy Burns should be dismissed; 4) that the § 1983 claims for false arrest and excessive

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1. Each of the remaining defendants (Stacy Burns, Robert Morrison, B.J. Moore, and the Board of the County Commissioners of Bryan County) filed its own motion for summary judgment.

force against Stacy Burns in his individual capacity should not be dismissed; 5) that the false imprisonment, negligence, and intentional infliction of emotional distress claims against Stacy Burns in his official capacity should not be dismissed; 6) that the § 1983 municipal liability claim for inadequate hiring and training against Bryan County should not be dismissed; and 7) that the common law negligent hiring and negligent training claims against Bryan County should not be dismissed.[2]

Introduction

Plaintiff Jill Brown ("Brown") brought this action against Reserve Deputy Sheriff Stacy Burns[3] ("Burns"), Deputy Sheriff Robert Morrison ("Morrison"), Sheriff B.J. Moore ("Moore"), and the Board of the County Commissioners of Bryan County ("Bryan County") alleging a § 1983 action for excessive force, false arrest, and for cruel and unusual punishment under the Eighth Amendment. Plaintiff also brought common law actions for intentional infliction of emotional distress, false imprisonment, and negligence. Plaintiff also asserted a § 1983 action against Bryan County and Sheriff Moore in his official capacity for inadequate training. On February 25, 1992, this Court dismissed Bryan County Sheriff's Department from the suit entirely, as well as the state law actions against Morrison and Moore.

This case stems from an incident that occurred on May 12, 1991 between Jill Brown and Bryan County deputy sheriffs at approximately 1:30 a.m. Bryan County deputy sheriffs had set up a checkpoint just north of the Denison Dam to monitor drunk

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2. For purposes of this motion, the Court examined plaintiff's third amended complaint.

3. Stacy Burns' uncle is Sheriff B.J. Moore.

driving. Deputy Sheriff Robert Morrison observed a pick-up truck driven by Todd Brown, the husband of the plaintiff, approach the checkpoint. Plaintiff Jill Brown was in the pick-up truck as a passenger. Upon seeing the checkpoint, Todd Brown turned the pick-up around and proceeded back across the dam.[4]

Deputy Sheriff Robert Morrison ran to his vehicle to pursue the pick-up. Stacy Burns, a reserve deputy sheriff authorized by Sheriff Moore to ride in patrol cars and make arrests, got into Morrison's car to assist. Both Morrison and Burns testified that they turned on the siren and flashing lights and pursued the pick-up at high speeds approaching one hundred miles per hour as it proceeded across the dam, the spillway, and toward Eisenhower Park. Todd Brown contends that he was not speeding, that he mistakenly ignored the flashing lights[5] because he did not believe he was being pursued, and that once he noticed he was being pursued, he slowed down, signaled, and then stopped a short distance from Eisenhower Park.

Jill Brown contends that after their pick-up truck stopped, she obeyed the orders of the officers. She contends that she raised her hands,[6] unlocked the door, and began to get out of the pick-up truck. According to the plaintiff, Burns then opened the door more fully, and threw her to the ground by twisting her arm behind her back. Brown contends Burns injured her knees in

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4. It is disputed whether Todd Brown did this in a sudden and reckless manner. Under Oklahoma law, it is not unlawful to turn around prior to reaching a checkpoint.

5. Todd Brown contends that the siren was not on.

6. Morrison and Burns contend that Jill and Todd Brown ignored their instructions at first, that Todd Brown resisted the placing of handcuffs on him, and that Jill Brown only came out after Burns approached the window and attempted to open the door. Burns denies using excessive force.

throwing her to the ground face first. The plaintiff also contends that Burns subsequently removed her from the ground by jerking the chain between her handcuffs when her hands where handcuffed behind her back and jerking her to her feet.

After the initial seizure, it is undisputed that Burns moved Jill Brown to the rear of the pick-up next to her husband where they remained handcuffed while Morrison searched the pick-up. He found a loaded rifle, an unloaded pistol, and a beer can in the pick-up truck. During this period of time, Morrison used his radio to run a check on the vehicle registration, the driver's license of Todd Brown, and to determine if any warrants against either occupant were in existence. He found that Todd Brown was driving with a suspended driver's license. Morrison issued five tickets to Todd Brown for various traffic offenses. Jill Brown did not receive a ticket and was released after approximately one hour.

Sheriff B.J. Moore was not at the checkpoint and did not participate in the incident. However, Moore authorized such checkpoints.

Summary Judgment Standard

The granting of summary judgment is proper if "there is no genuine issue as to any material fact and . . . the moving party is entitled to judgment as a matter of law." Fed. R. Civ.P. 56(c). The trial court must resolve all reasonable doubts in favor of the party opposing the motion. *Casey Enterprise v. Am. Hardware Mut. Ins. Co.*, 655 F.2d 598, 602 (5th Cir. 1981) (citations omitted). The party seeking summary judgment carries the burden of demonstrating that there is no actual dispute as to any material fact in the case. This burden, however, does not require the moving party to produce evidence showing the absence of a genuine issue of material fact. *Celotex Corp. v. Catrett*, 106 S.Ct.

2548, 2554 (1986). The moving party satisfies the burden by "pointing out to the district court . . . that there is an absence of evidence to support the nonmoving party's case." *Id.*

Once the moving party has satisfied its burden, the nonmovant must "set forth specific facts in support of allegations essential to that party's claim and on which that party will bear the burden of proof, then summary judgment will be appropriate. *Celotex*, 106 S.Ct. at 2552-53. Even if the nonmovant brings forth evidence in support of its allegations, summary judgment will be appropriate "unless there is sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party. If the evidence is merely colorable, or is not significantly probative, summary judgment may be granted." *Anderson v. Liberty Lobby, Inc.*, 106 S.Ct. 2505, 2511 (1986)(citations omitted).

Discussion

Burns and Morrison's Liability

Burns and Morrison raise qualified immunity as their defense. Once a qualified immunity defense is raised, the plaintiff must show that defendant violated clearly established federal law. The "contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right." *Anderson v. Creighton*, 107 S.Ct. 3034 (1987).

The right to be free from excessive police force should be analyzed under the Fourth Amendment's objective reasonableness standard rather than under a substantive due process standard. *Graham v. Connor*, 109 S.Ct. 1865, 1867 (1989). The calculus of reasonableness must include allowance for the fact that officers must make split-second decisions.

Graham, 109 S.Ct. at 1872. Furthermore, the right to make an investigatory stop necessarily entails the right to use some degree of physical force. *Graham*, 109 S.Ct. at 1871. Finally, the Fourth Amendment is not violated by an arrest based on probable cause, even though the wrong person is arrested. *Hill v. California*, 91 S.Ct. 1106, 1110 (1971).

Although the excessive force analysis requires evaluating the claim based on the totality of the circumstances, *Graham* identified three factors in particular: 1) the severity of the crime; 2) whether the suspect poses an immediate threat to the officers or others; and 3) whether the suspect is actively resisting or attempting to evade arrest by flight. In this case, the crimes at issue were traffic offenses. Second, according to the plaintiff, she raised her hands, unlocked the door, and did not resist arrest in any other manner. Third, according to Todd Brown, as soon as he realized that the police were pursuing him, he soon slowed down, signaled, and parked on the left side of the road. Finally, according to the plaintiff, she was not resisting or evading arrest. Thus, the Court finds that a material fact issue exists with respect to the excessive force claim against Burns.

However, the excessive force and false arrest claims against Morrison should be dismissed. It is undisputed that Morrison did not apply force to the plaintiff. Thus, he cannot be liable under § 1983 for an excessive force claim. *Simpson v. Hines*, 903 F.2d 400, 403 (5th Cir. 1990). Furthermore, although a police officer has an affirmative duty to intercede on behalf of a citizen whose constitutional rights are being violated in his presence by other officers, *O'Neil v. Krzeminski*, 839 F.2d 9 (2nd Cir. 1988), Morrison was on the driver's side of the truck apprehending Todd Brown and did not have time to intervene. There is no evidence to suggest that Morrison stood by and became a tacit collaborator in Burns' actions. *O'Neil*, 839 F.2d at 12. The excessive force and false arrest claims against Morrison should be dismissed.

With respect to the false arrest claim against Burns, he contends that he had probable cause to arrest the plaintiff. Probable cause is a defense to false arrest claims. *Gerstein v. Pugh*, 95 S.Ct. 854, 866 (1975); *McConney v. City of Houston*, 863 F.2d 1180, 1184-85 (5th Cir. 1989) (holding that a person may be constitutionally detained for at least four or five hours following a lawful warrantless arrest for public intoxication). A police officer has probable cause to arrest if, at the time of the arrest, he had knowledge that would warrant a prudent person's belief that the person arrested had already committed or was committing a crime. *Duckett v. City of Cedar Park, Texas*, 950 F.2d 272, 278 (5th Cir. 1992) (*citing Gladden v. Roach*, 864 F.2d 1196 (5th Cir. 1989), *cert. denied*, 109 S.Ct. 3192 (1989)).

In this instance, Brown was merely a passenger and, according to her, did not attempt to escape or resist arrest. Although she was handcuffed for approximately one hour, she was not charged with any offense. The Court concludes that a material fact issue exists as to whether there was probable cause for the arrest. Plaintiff's federal claim for false arrest and the state claim of false imprisonment against Burns should not be dismissed.

Finally, plaintiff has alleged an Eighth Amendment violation for cruel and unusual punishment. Such a cause of action requires a formal adjudication of guilt for a valid claim to arise. *Bell v. Wolfish*, 99 S.Ct. 1861, 1872 n.16 (1979). There was no adjudication at the time of the incident and thus this cause of action should be dismissed.

With respect to the state law claims for negligence, false imprisonment, and intentional infliction of emotional distress, Burns claims that he is not liable under the Oklahoma Tort Claims Act ("the Act"). 51 O.S.A. § 151 *et seq.* It is clear that

Burns is an "employee" under the Act[7] as Burns had Moore's authorization to work the checkpoints. Sections 152.1 of the Act waives the doctrine of sovereign immunity. However, Section 153 of the Act provides in relevant part: "The liability of the state or political subdivision under this act shall be exclusive and in place of all other liability of the state, a political subdivision or employee at common law or otherwise." Thus, the state law claims survive against the County and not against Burns individually.[8]

The Liability of Bryan County and Sheriff Moore

In *Monell v. Department of Social Services*, 98 S.Ct. 2018 (1978), the Supreme Court held that a municipality is liable under § 1983 for a deprivation of rights protected by the Constitution or federal laws that is inflicted pursuant to official government policy. The Supreme Court has subsequently recognized a § 1983 action under *Monell* for failure to train. *See City of Canton, Ohio v. Harris*, 109 S.Ct. 1197, 1205-06 (1989). The Fifth Circuit, however, has cautioned that to make a showing of inadequate training against a municipality, there has to be some evidence of a pattern of similar incidents in which citizens were injured, *Leatherman v. Tarrant County Narcotics Intelligence*, 954 F.2d 1054, 1058 (5th Cir. 1992), *cert. granted*, 112 S.Ct. 2989 (U.S. June 29, 1992), unless there was proof that the incident was caused by an existing, unconsitutional municipal policy. *City of Oklahoma City v. Tuttle*, 105 S.Ct.

7. The Oklahoma Torts Claims Act defines an "employee" to mean "any person who is authorized to act in behalf of a political subdivision or the state whether that person is acting on a permanent or temporary basis, with or without being compensated or on a full-time or part-time basis." 51 O.S.A. § 152.5.

8. Burns was acting within the "scope of [his] employment" as that term is defined under the Act because Burns was performing tasks lawfully assigned by Moore. *See* 51 Ok.St.Ann. § 152(9).

2427, 2436-37 (1985). There has been no showing of other incidents of excessive force by Burns while serving as a reserve deputy sheriff. Thus, a failure to train cause of action can only yield municipal liability "where the county's failure to train reflects deliberate indifference to the consitutional rights of its inhabitants." *City of Canton*, 109 S.Ct. at 1206.

In evaluating whether a municipal policy is unconstitutional, the focus must be on the adequacy of the training program in relation to the tasks the particular officers must perform. *Id.* at 1206-07. Plaintiff has alleged that Sheriff Moore, acting on behalf of the County, had a policy of allowing untrained and unqualified reserve deputies to serve in law enforcement activities and make arrests. Under this policy, Burns was provided a uniform and badge and could make arrests, but could not carry a gun or operate patrol cars. Moore required all deputy sheriffs to be certified through the Council on Law Enforcement, Education, and Training (CLEET).[9] However, Burns was not certified through CLEET and did not receive any additional training from the County. The Plaintiff also put forward evidence that Burns had a conviction for assault and battery stemming from a January 4, 1990 incident. Burn's lack of training and his alleged propensity for violence raise a material fact issue as to whether Moore, acting on behalf of the County, displayed deliberate indifference.[10] Thus, Plaintiff's § 1983

9. Under Oklahoma law, CLEET exercises authority over the training and certification of all police officers, is the school where all Oklahoma officers are trained, and is vested with the responsibility of certifying that Oklahoma police officers satisfactorily complete the basic police course offered by them. *See Meade v. Grubbs*, 841 F.2d 1512, 1529 (10th Cir. 1988).

10. *See City of Canton*. 109 S.Ct. at 1205-06 ("[I]t may happen that in light of the duties assigned to specific officers . . . the need for more or adequate training is so obvious, and the inadequacy so likely to result in the violation of constitutional rights, that the policymakers can be said to represent a policy for which the city is responsible . . .").

action for inadequate hiring and training against Bryan County should not be dismissed.[11].

Plaintiff's common law actions for negligent hiring and negligent training against the County should also not be dismissed. *See* 51 Okl. St. Ann. § 153.

Section 163 of the Governmental Tort Claims Act requires that all suits name as the defendant the state or political subdivision. "In no instance shall an employee of the . . . political subdivision acting within the scope of employment be named as a defendant . . ." 51 Okl.St.Ann. § 163. Thus, all claims against Sheriff B.J. Moore should be dismissed.

Summary

The Court concludes that 1) all the claims against Robert Morrison should be dismissed; 2) that all claims against Sheriff B.J. Moore should be dismissed; 3) that the cruel and unusual punishment claim against Stacy Burns should be dismissed; 4) that the § 1983 claims for false arrest and excessive force against Stacy Burns in his individual capacity should not be dismissed; 5) that the false imprisonment, negligence, and intentional infliction of emotional distress claims against Stacy Burns in his official capacity should not be dismissed; 6) that the § 1983 municipal liability claim for inadequate hiring and training against Bryan County should not be dismissed; and 7) that the common law negligent hiring and negligent training claims against Bryan County should not be dismissed.

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11. Bryan County contends that it is not liable for the actions of Sheriff Moore. However, Oklahoma law prescribes the precise manner in which a party may sue a county. 19 O.S.A. 4. Plaintiff has complied with this requirement. Furthermore, this Court previously dismissed the Bryan County Sheriff's Department as an improper party.

It is so ORDERED.

Signed this 9th day of December, 1992.

s/ Paul Brown
UNITED STATES DISTRICT JUDGE

Mld 12-10-92 to: *Ellis*
Hill
Sheridan
Kennedy

EXCERPTED STIPULATION

* * *

2. The incidents made the basis of this incident occurred in Grayson County, Texas and within the Eastern District of Texas.

3. The venue is proper pursuant to 28 U.S.C. § 1391(b) and (e).

4. At all times relevant hereto, Defendant Morrison was a Bryan County Deputy.

5. At all times relevant hereto, Defendant Morrison was acting as a deputy for Bryan County.

6. At all times relevant hereto, Defendant Moore was duly elected and acting Sheriff of Bryan County, Oklahoma.

7. At all times relevant hereto, Defendant Moore was the policy maker for Bryan County regarding the Sheriff's Department.

8. Defendant Bryan County is a subdivision of the State of Oklahoma.

9. At all times relevant hereto, Defendants Burns, Morrison, Moore, and Bryan County Sheriff's Department were acting under the color of law and pursuant to their authority as police personnel.

10. At approximately 1:30 a.m. on May 12, 1991, Defendants Burns and Morrison and other personnel from the Bryan County Sheriff's Department set up a checkpoint roadblock on the south side of the City of Cartwright, Oklahoma, just north of Denison Dam.

11. At approximately 1:30 a.m. on May 12, 1991, a vehicle driven by Rodney Todd Brown approached the checkpoint roadblock from the south having just crossed Denison Dam and being

* * *

Contested Issues of Fact

57. Whether the actions of Morrison were in accordance with proper law enforcement procedures.

58. Whether the actions of Burns were in accordance with proper law enforcement procedures.

59. Whether the sole producing cause of Jill Brown's injuries and damages, if any, was her own negligence.

60. Whether Burns is an employee of the office of Sheriff of Bryan County.

61. Whether the acts complained of violated any custom, policy, procedure, ordinance, statute or law.

Contested Issues of Law

1. Whether Defendant Board of County Commissioners of Bryan County is entitled to qualified immunity.

2. Whether Defendant B.J. Moore is entitled to qualified immunity.

3. Whether Defendant Robert Morrison is entitled to qualified immunity.

4. Whether Defendant Stacy Burns is entitled to qualified immunity.

5. Whether Defendant Board of County Commissioners is liable under 42 U.S.C. § 1983 when they did not participate in any policy decisions with regards to the conduct and operation of the office of Bryan County Sheriff.

6. Whether Defendant Board of County Commissioners is liable under state law for the acts complained of when they did not participate in any policy decisions with regards to the conduct and operation of the office of Bryan County Sheriff.

* * *

EXCERPTS OF TRANSCRIPT OF PROCEEDINGS — RE: OKLAHOMA HIRING STANDARDS

[Commencing at page 290]

Limine that Mr. Kennedy filed regarding Stacy Burns' past criminal history, arrest record, conviction record, that type of thing.

MR. JACK KENNEDY: What is your request?

MR. WALKER: It's in regards to your Motion in Limine. I believe the Court has granted it for the purposes of — that he wanted to bring that information up outside the presence of the jury prior to putting in on from a witness on the stand.

Our next witness will be a law enforcement expert who we believe will be prepared to give the opinion that it was negligent of Bryan County and B. J. Moore to hire Stacy Burns in this case based upon his past criminal history.

THE COURT: Well, is that based on arrests and convictions both or convictions?

MR. WALKER: It's based upon both, Your Honor. I think our expert, Dr. Schweizer, will testify that when you see a criminal history of the nature that Mr. Burns has, a reasonably prudent law enforcement officer, prior to hiring him, would go back and do a check on the arrest, to make sure what the disposition of those were. And I think there's going to be some things that would have been found out had that check been done. And it's not time-consuming. It's not costly. It's something that's easily done and any reasonably prudent sheriff would have done. And that's in regards to [291] our negligent hiring claim, Your Honor.

I think he will testify, and he's been a police chief and he's been a police officer and he's certified in several states and he'll testify that a reasonably prudent sheriff's officer, prior to hiring someone with that type of history, would take that into consideration and would do a background check as to what was the disposition of those arrests, both arrests and convictions.

MR. JACK KENNEDY: Of course, we would object to any charge that, no conviction, or any arrest of which there's no conviction, because it is assuming somebody is guilty of something when there's nothing more than a document or something that occurred at sometime in the past. We have no objection to his referring to what he had been convicted of, and we've more or less stipulated as to what that is. But as to other matters, he doesn't know if he was arrested or what the facts or situations were because there has been no other conviction.

MR. WALKER: Your Honor, under 404(b), we're not putting this evidence in to show Mr. Burns' character.

THE COURT: I understand. It's for a very specific purpose of whether or not the Sheriff should have investigated further. I understand why you're offering it.

MR. WALKER: Your Honor, I believe the records will show that some of these arrests, prior arrests of Mr. Burns [292] would include resisting the arrest of an officer. Several arrests for assault and battery, public intoxication, and presenting a false I.D. to a police officer. We believe all those are relevant to showing the Sheriff's negligence in not investigating and determining the situation in regards those prior to hiring Stacy Burns.

THE COURT: Let me see that — do you have a wrap sheet? Is that what you're —

MR. WALKER: Yes, Your Honor.

Additionally, Your Honor, there are arrests and convictions that are not even evidence on that record but that we believe should have led a reasonable prudent officer to make further inquiry as to the background of Stacy Burns prior to giving him a badge and putting him on the streets.

Your Honor, might I make one other point? I believe the record will also show that while Stacy Burns was on probation for one offense, that he committed several other offenses in violation of his probation. Those did not result necessarily in convictions, but they did result in violations of his probation, and we believe for that additional purpose, they show that Sheriff Moore is negligent in hiring Stacy Burns.

MR. JACK KENNEDY: Your Honor, may I respond?

THE COURT: Yes.

MR. JACK KENNEDY: The law of Oklahoma is very [293] clear at what the obligations of the Sheriff are. If this man had been convicted of a felony or a crime involving moral turpitude and is under 21 years of age, he is not eligible to be enrolled in the academy or become an officer. None of these conditions exist in this case. Now, this man may have an opinion, but he's going against the state law. And so he's offering, very prejudically, items which have no bearing whatsoever on the laws that will be given to the Court. 70, the Title 70, Section 3311, sets out specifically what a sheriff is required to do.

MR. WALKER: Those are the minimum requirements, Your Honor. And I believe the record will additionally show, if we're allowed to get into it.

THE COURT: Now, what did you say, Mr. Walker? I didn't — you said those are what?

MR. WALKER: Those are the minimum requirements. That doesn't preclude a sheriff from taking other steps that a reasonably prudent sheriff would in determining whether or not they should hire someone as a police officer.

Additionally, I believe we're going to have evidence that there was a warrant out on the day of this incident for Stacy Burns' arrest. I believe that's appropriate and should be placed into evidence.

THE COURT: Do you have a copy of the Oklahoma statute that you referred to?

[294] MR. JACK KENNEDY: Yes. I have given that to the Clerk as one of my exhibits, Title 70 — did I give you a list of my exhibits?

If I may have one moment, Your Honor?

I believe Section D(2) at the bottom of the second page, Your Honor, is the portion of which I'm referring.

THE COURT: Well, the Court is of the opinion that this evidence is relevant to the issue of whether or not the Sheriff was negligent and that its probative value — it's obviously prejudicial, but it's probative value outweighs any unfair prejudice, and the Court is going to admit it for that purpose.

MR. JACK KENNEDY: Do I understand the Court will admit all charges, whether or not they've been convictions or not?

THE COURT: I think as to whether or not — I think it's a different issue than impeachment or character. It just goes to the matter of whether or not he was negligent and I'm going to admit it for that purpose.

MR. JACK KENNEDY: If I may make my objection, then, Your Honor —

THE COURT: You certainly may. You may make it now.

MR. JACK KENNEDY: If I might, Your Honor, before the jury comes in —

[295] THE COURT: I understand.

MR. JACK KENNEDY: The Defendant objects to the introduction of any such testimony as to the opinion of the expert that would require the Sheriff to do something that is not the recognized standards of law of the State of Oklahoma. That it is so prejudicial to offer testimony of charges and not convictions when no law requires the Sheriff to do that, which this expert apparently will testify.

The evidence will not be offered to show the gross negligence or conscious indifference as required by *Langerand* and the *City of Oklahoma vs. Tuttle*, and will not be shown to be a proximate cause of the incident which occurred on May 11th or 12th, 1991. That the prejudicial effect of this would overcome any possible ability of the Defendant to overcome the opinion based upon requirements of the Sheriff that is not required by the law under which he is required to operate, to-wit, Title 70, Section 3311 of the Oklahoma statutes, as promulgated by the Legislature.

Further, Your Honor, it is an attempt, in violation of the

Supreme Court's edict in the City of *Oklahoma vs. Tuttle* to show one single incident to establish a customer policy when the Courts have consistently, with *Rodriguez, Langerand* and *City of Oklahoma vs. Tuttle* said that that is not sufficient evidence to allow the showing of a custom. To show that he only did it as to this one young man and not to [296] show that that was his practice would allow the Court and the jury to consider a single incident as being the grounds of a custom. Otherwise, there's no reason for this evidence to be tendered to the jury at all. He has to show a custom practice by the Sheriff, not as to this one person, but that it was practiced throughout his department and acquiesced in by the policymaker or the county.

THE COURT: All right. Thank you, Mr. Kennedy.

Anything else before we bring the jury in?

MR. WALKER: Your Honor, may we approach, just briefly? May we approach, just briefly?

THE COURT: All right.

(A side bar discussion was had between the Court, Counsel for the Plaintiff and Counsel for the Defendants, out of the hearing and presence of the jury as follows:)

MR. JACK KENNEDY: Your Honor, for purposes of the record, may we have a running objection to this testimony?

THE COURT: The Court will consider that you timely objected to any evidence as to arrests and not convictions that the expert testifies about.

MR. JACK KENNEDY: Thank you.

(The following occurred in the hearing and presence of the jury as follows:)

(Jury entered the courtroom at 10:40 a.m.)

THE COURT: You may be seated.

EXCERPTS OF TRANSCRIPT OF PROCEEDINGS — SCHWEITZER TESTIMONY

[Commencing at page 317]

THE COURT: Well, sustained.

BY MR. WALKER:

Q. You mentioned convictions of Stacy Burns prior to May the 12th of 1991. A. Yes.

Q. Your review of the documentation, what type of convictions, how many and what type of convictions did Stacy Burns have prior to May the 12th, 1991?

THE COURT: Now, just a minute. Now, members of the jury, I'm going to allow this witness to answer that question and admit this evidence for a limited purpose. The limited purpose is that you may consider it so far as you want or desire to consider it in determining whether the Sheriff of Bryan County acted properly in allowing Stacy Burns to serve as a reserve deputy sheriff. You are not to consider it in determining whether Stacy Burns did or did not do a particular act on May the 12th, 1991, the date of this incident.

You may proceed.

BY MR. WALKER:

Q. Dr. Schweizer, you mentioned certain convictions that you found in the documentation that you reviewed relating to Stacy Burns. Would you describe for the jury the number and

nature of those convictions? A. Yes. There were nine convictions for moving traffic [318] violations. One for assault in battery. One for having a false I.D. in possession. One for public drunk. One for expired tags, which means failure to pay the taxes. One for driving under suspension and one for driving under the influence of alcohol.

Q. Additionally, did the documentation uncover additional — strike that.

Do you have an opinion as to whether or not the, not only the conviction record but the arrest record of an individual should be investigated by a reasonably prudent law enforcement officer prior to selecting that person as a reserve deputy? A. Yes, it should be and I've seen many applications where it specifically asks for prior arrest record, not only convictions.

Q. The convictions that you've enumerated for us, did you also find additional charges, arrest charges against Stacy Burns?
A. Well, I found a document which indicated that a warrant was issued for a probation violation.

Q. All right. A. And that warrant was valid apparently at the time he was hired by Bryan County.

Q. I'm not sure I understand that. Stacy Burns was on probation? [319] A. Yes, for the driving under the influence of alcohol and failed to meet the conditions of probation and a warrant was issued for his arrest which — which I believe was valid the time I was hired by Bryan County.

Q. Was that arrest also valid on May the 12th of 1991? A. Yes, it was.

Q. Was — are you saying, then, that Stacy Burns was on a probation for a criminal violation on May the 12th of 1991? A. Yes.

Q. And that he was in violation of that probation and an arrest warrant had been issued? A. Yes.

Q. The conditions —

THE COURT: Now, members of the jury, the limiting instruction that I gave you previously also pertains to the testimony that the witness has just given.

BY MR. WALKER:

Q. You mentioned that there were violations of that probation prior to May the 12th of 1991. What were those violations? A. This listed for the order revoking the probation, mentioned that failure to perform community service and the fact that he failed to pay fines. You asked me about the conditions of probation? The conditions of probation that you not violate any state — federal, state or local criminal [320] laws, and that you not consume alcoholic beverages —

MR. JACK KENNEDY: Your Honor —

THE COURT: Just a minute.

MR. JACK KENNEDY: I don't think that's responsive, the last part of the answer.

THE COURT: Sustained.

BY MR. WALKER:

Q. Did your investigation uncover violations by Stacy Burns of his probation conditions? A. Yes.

Q. And which probation conditions did you find that Stacy Burns had violated? A. Well, he was arrested and convicted of public drunk during that time he was on probation.

Q. The assault and battery, was that during the — A. Assault and batter also occurred during the time of his probation.

Q. The false I.D.? A. Yes.

Q. One of the DWLS's? A. Yes.

Q. Driving while license suspended? A. Yes.

Q. Based upon the testimony and documentations that you've reviewed, do you have an opinion as to whether or not on May [321] the 12th, 1991, Stacy Burns had the potential for a disposition to be physically aggressive such that would disqualify him from becoming a sheriff's reserve? A. Yes, I do.

Q. And what is that opinion? A. I believe he has such a disposition —

Q. And — A. — based on what was enumerated.

Q. All right. Did you find an additional arrest record of Stacy Burns regarding a charge of resisting arrest? A. Yes, there was a record or a charge of resisting an officer. That's correct.

Q. Did you also review Stacy Burns' deposition? A. Yes, I have.

Q. And based upon his deposition, do you have an opinion as to whether or not Stacy Burns had the potential for a predisposition to being physically aggressive such that would disqualify him from becoming a law enforcement officer?

MR. JACK KENNEDY: Your Honor, I would object to him making an opinion based upon matters not in evidence, the deposition of Stacy Burns, of which we don't know to what he's referring.

THE COURT: Overruled.

BY MR. WALKER:

Q. Do you have an opinion? A. Could you repeat the question? Does that involve him being hired or what he's done after he was hired or what?

THE COURT: Re-ask your question, Mr. Walker.

BY MR. WALKER:

Q. In reviewing Stacy Burns' deposition, did you find testimony, sworn testimony from Stacy Burns regarding the number of arrests he had made prior to May the 12th, 1991? A. Yes.

Q. And what was that number? A. He indicated he had made approximately a dozen, 12 arrests.

Q. And did you find sworn testimony by Stacy Burns in that deposition as to how often during those 12 arrests that he felt it was necessary to have to take someone to the ground in effecting that arrest?

MR. JACK KENNEDY: Your Honor, he's referring to —

it's hearsay to the Court and the jury and I would object to the testimony based on something that's not in evidence, to wit, whatever his answers may be.

MR. WALKER: Your Honor, it's sworn testimony by a party.

THE COURT: Well, I understand that, sustain that. I'm going to sustain that objection.

BY MR. WALKER:

Q. In reviewing all the documentation, including the [323] deposition testimony of Sheriff B. J. Moore, did Sheriff Moore have in place on May the 12th, 1991 any written criteria regarding personnel selection? A. I did not find any evidence of that.

Q. In reviewing the deposition of expert witnesses designated by the Defense, particularly Bob Wallace, did you find any, that they had any policy at all in regards to hiring or why they didn't have? A. A policy of flexibility meaning no specific rules, to have maximum flexibility.

Q. Maximum flexibility to do what? A. Well, without any rules, you would have maximum flexibility to hire anyone, regardless whether they're qualified or not.

Q. When B. J. Moore selected Stacy Burns as a law enforcement reserve, did he check — had he checked Stacy Burns' criminal history? A. There's indication in the records that would show that, in fact, he did check the criminal history of Stacy Burns.

Q. And what documentation is that? A. It's a printout

from the Oklahoma State Bureau of Investigation which keeps a record of any time an inquiry is made for a specific reason of a criminal record, when fingerprints are submitted, et cetera. And it lists here or indicates that on the 8th of May, 1991, an inquiry was made [324] from Bryan County, reference Stacy Burns as a police applicant. So that would mean an inquiry regarding Stacy Burns' criminal history.

Q. And when was that inquiry made? A. On the 8th of May.

Q. Four days before the incident that we're here about? A. Yes.

Q. Why is it important for law enforcement personnel who are the head of their particular agency to be careful in who they select or hire? A. It's important because those people are in a position of trust and responsibility and those people, if you're not careful in the hiring selection, you don't know whether that person has — is likely to abuse the public, whether they'll even perform their job or duties properly. You may hire an individual that uses excessive force, that disregards people's individual rights. You have to ascertain, as I stated earlier, all these other personality characteristics to ensure that they properly perform their duties. It's a position of public trust.

Q. At the time B. J. Moore made the decision to hire Stacy Burns, did Stacy Burns have any experience in law enforcement? A. Not that was indicated in the depositions.

Q. At the time B. J. Moore made the decision to hire Stacy [325] Burns, at that time, did Stacy Burns have any training in law enforcement? A. There was some indication that he had begun to attend the C.L.E.E.T. Academy, but from what I understand, he had not attended more than perhaps a few days or a week or two.

Q. From your review of the documentation, including the deposition of B. J. Moore and Bob Wallace and Stacy Burns, did Bryan County, through B. J. Moore, provide any legal or any local training to Stacy Burns prior to authorizing Stacy Burns to go out and make forcible arrests? A. No, they did not.

Q. Did Bryan County provide any local training to Robert Morrison or any other deputy on how to work with inexperienced reserve deputies? A. Based on the depositions that I have read, I would say no.

Q. On the night — based upon — you've read the depositions of Officer Morrison and Mr. Burns, is that correct? A. Yes, that's correct.

Q. The two primary officers that were involved in the stop of Todd and Jill Brown? A. Yes.

Q. Based upon their depositions and the depositions of B. J. Moore, on the night of May the 12th, 1991, who was in

* * *

[359] A. No, that's not correct.

Q. Are you satisfied that Title 70, Section 3311 sets out the standards by which officers are to be trained and certified in the State of Oklahoma? A. Are you allowing me to qualify my answer?

Q. First, have you got an answer? If you don't — A. It sets out those standards in that fashion, yes.

Q. All right. And did the sheriff of Bryan County comply with the laws of the State of Oklahoma and in particular, Title 70,

Section 3311 through 3314 in the employment of his deputy sheriffs? A. Yes.

Q. Sir? A. What was the question again? Was there one?

Q. Did the sheriff of Bryan County, Oklahoma comply with the applicable standards of law in the hiring of the deputies that were employed at and in Bryan County in May of 1991? A. Yes, I would say so.

Q. So what you are telling the jury is that even though the sheriff complied with the law, you think he should do more? A. Absolutely.

Q. And your opinion is your opinion and not the opinion of the Oklahoma Legislature, is it?

MR. WALKER: Your Honor, we're going to object as to what the opinion of the Oklahoma Legislature is. I [360] believe it calls for a legal conclusion and speculation.

THE COURT: Well, I think it's argumentative. I'll sustain the objection.

BY MR. JACK KENNEDY:

Q. I'll put it this way: You have no law to support your opinion? A. Not —

Q. Yes or no. A. What I'm supporting my opinion with is the fact that those training standards are not —

MR. JACK KENNEDY: I object to not being responsive. Please? I object to him not being responsive. I asked him if he had any law that would support his opinion.

THE COURT: Well, sustain the objection. Listen to the question, answer it if you can.

BY MR. JACK KENNEDY:

Q. Do you have any law to support the opinion that you've given the jury this morning as to the training standards of the State of Oklahoma that will support your opinion? A. No Oklahoma law.

Q. All right. You have been critical of Stacy Burns. Please tell the jury exactly what law that the Bryan County Sheriff violated in allowing him to be a reserve deputy or to work with another officer.

MR. WALKER: Your Honor, we would object to the [361] question. The standard is not whether Sheriff Moore violated the law but whether or not his hiring of Stacy Burns and training of he and Robert Morrison was negligent, not that he violated the law.

THE COURT: Sustained.

BY MR. JACK KENNEDY:

Q. Or do you have any law that Sheriff Moore has violated in any of the incidents about this — A. Yes, I do.

Q. — hiring of Stacy Burns? A. Yes, I do.

Q. Which law did he violate? A. The law that you arrest people with an outstanding warrant before you hire them.

Q. Wait a minute. We're talking about what law B. J. Moore violated, the sheriff. A. Well, he had an obligation to arrest

individuals that have an outstanding warrant for them. At the time he applied for that position, B. J. Moore should have been and probably was aware of that fact and he didn't arrest that individual. That's a violation. Then he hired him as a deputy.

Q. Anything else? A. That is all, in terms of the law.

Q. All right. Now, did Stacy Burns violate any Oklahoma standards as set by the Legislature in becoming a reserve [362] deputy? A. Not that I can tell.

Q. So the Oklahoma — so by Oklahoma State statutes, Bryan County Sheriff's Office and Stacy Burns complied with the peace officer qualifications and standards in his hiring and serving as a part-time deputy? A. That's correct.

Q. All right. As I understand, your criticism of Mr. Burns is that if he had committed a lot of driving violations as a teen-ager, and if he had gotten in a fight as a teen-ager and paid a fine, and if he had gotten drunk in a car and was asleep and they arrested him, that that makes it impossible for him to ever properly be considered as a candidate for a deputy sheriff?

MR. WALKER: Your Honor, we object. I believe the Court had instructed Counsel not to go into the facts surrounding the arrests or convictions of Mr. Burns.

THE COURT: Well, on cross examination, Counsel, that doesn't apply.

A. What you would examine is the pattern of behavior in the past. Now, most of that behavior was within the preceding two and a half years. And when you look at that pattern of behavior, I would say that it's negligent to hire someone under those circumstances, given the pattern for behavior which shows blatant disregard for the law.

[363] BY MR. JACK KENNEDY:

Q. When he was arrested for I believe APVC or whatever it is, asleep in a car and drunk, he was 18 years old, was he not? A. I'd have to check. I'm not certain.

Q. Well, could you do that, please? I think it shows 1988, but you can check it. A. He was finally arrested on the warrant in 1990. Let's see, public drunk, it would be in September of 1989.

Q. When he was arrested in Marshal County? A. In Cleveland County for public drunk.

Q. I'm asking you about Marshal County when he was in an automobile — A. Driving under the influence?

Q. Yes. A. He would have been 18 years old, that's correct.

Q. Okay. Are you saying that if a teen-ager who goes to college and gets drunk in a car, that he does not have the proper background to become a police officer? A. I'm saying you don't look at an individual case. You look at a pattern and you look at the totality of the circumstance, including any other offenses that he's been arrested or convicted of.

Q. And if as a teen-ager he was — had a heavy foot and got a lot of tickets at driving, that should be a reason that he [364] cannot become a police officer? A. A combination of numerous tickets and citations is an indication of what kind of behavior you should expect from him, and it's certainly an indication that you need to probe into that individual's behavior through background investigation.

Q. Now, these are your opinions and not the state law, am I correct? A. That's correct.

Q. All right. Now, you have been critical of the sheriff for not screening his deputies or just Stacy Burns? A. Specifically, Stacy Burns, and I have no indication whether the screening process for anyone else was different.

Q. So the evidence you want the jury is that the only evidence you have as to the sheriff's custom, or only evidence you have as to the manner of hiring applies to his lack of screening of Stacy Burns, is that correct?

MR. WALKER: Your Honor, we'd object. I believe the question calls for a misapplication of the law. I believe the law is that one decision by the policymaking official for a county —

THE COURT: Well, Counsel, I'm going to instruct the jury on the law. And as I told you before, the law will come from the Court. What the lawyers say the law is is not binding and not controlling. Don't pay any attention to it. [365] I'll — if that's an objection to the question, I'll overrule it. You may —

MR. JACK KENNEDY: If you can read the question back, or can you answer it?

THE COURT: Well, just re-ask the question, Mr. Kennedy.

MR. JACK KENNEDY: All right. I've forgot what it was, Judge.

BY MR. JACK KENNEDY:

Q. The only complain that you have as to the sheriff's department is the lack of screening of Stacy Burns' application

to become a police officer? A. I believe Under-Sheriff Wallace indicates that they did have a lack of particular standards to maintain maximum flexibility in hiring, et cetera.

Q. I didn't ask you that, sir. A. So I would conclude from that they don't have any standards for anyone else either.

Q. You're assuming from what? A. I would conclude from that they don't have any standards for hiring any other deputies either.

Q. Assuming from that are you — A. From the comments made by Under-Sheriff Wallace in reference to the need to have flexibility, and that's why there's a lack of standards.

[366] Q. I take it, then, that you have made absolutely no investigation of the hiring of deputies by Sheriff B. J. Moore during the past year or so you've been employed to testify in this case? A. I'm basing my opinion on the depositions.

Q. A deposition that was taken by Mr. Walker of B. J. Moore? A. Yes.

Q. All right. A. And of the other people, Under-Sheriff Wallace.

Q. Let me ask you this: I submit to you that every deputy, every deputy that was hired and employed by the county sheriff, B. J. Moore, at and before this incident, was a certified fully trained C.L.E.E.T. trained officer of the peace. I submit that's what the evidence will show. Assuming that to be true, are you still critical of the people that Sheriff Moore employed to be his deputies? A. I would disagree with your term, fully trained. I've already indicated that I don't believe the deputies were adequately trained.

Q. In other words, what you're saying is if they're fully trained under state law, that's not fully trained under Dr. Schweizer's law? A. State training, the minimum training requirements under state law is insufficient, and I've indicated there's a need [367] for departmental training. So I wouldn't consider that fully trained simply by having gone through the state training.

Q. Let's go back to my question. We're talking about hiring now. If the only people that the sheriff hired were people who had been, had complied in every facet with the Oklahoma law of training, would you say his manner of hiring those people was insufficient in any way? A. Yes.

Q. And what would that be. A. You have to make sure they're not drug addicts. You have to make sure they're not on, they're not alcoholics. You have to make sure they haven't been engaged in criminal offenses, they don't have any warrants out for them somewhere. You still have to ensure that they're not engaged in any particular behavior which would make them unsuitable for police work. Just because you're a policeman somewhere doesn't mean necessarily you're suitable to be in that position. And there are police officers in Oklahoma who leave one agency when they're unsuitable, find a job in another agency which fails to do an appropriate background.

Q. Okay. Now, if there is — strike there.

You have made no effort whatsoever to find out if that occurred in his hiring selection process, have you? A Well, there's no indication that any backgrounds are conducted.

[368] Q. Answer my question, please. You have made no investigation to determine whether in truth and fact, that has occurred in hiring — A. What has occurred now?

Q. In the hiring process. You don't know anything about how he hires people, do you? A. Not anything other than what's indicated in the depositions.

Q. In his deposition. Now, I believe you were critical of the training of Mr. Burns — let me ask you this: Do you believe in on-the-job training of young police officers? A. Yes, it's essential.

Q. Okay. And you — A. On-the-job training. There's a difference between on-the-job training and field training which occurs after a completion of the regular academy. So I don't believe police officers ought to be trained to do their job in a form of on-the-job training. I believe field training ought to come after attending academy and learning the laws and the processes and in an academy environment. And after that, you're trained in the field.

Q. Again, that's your opinion and not the law? A. It's my opinion, yes.

Q. That's right. A. Well, the law, yes, that you be trained within one year [369] at an academy.

Q. Let me — the law at what? A. The law is that you be trained at a police academy, be formally certified by the end of one year of the initial year of employment in the State of Oklahoma. So that you have a requirement that you not only have, not only meet those initial requirements, that you be, or that you have completed training at the end of one year which means there's some emphasis on the importance of academy training.

Q. Well, let me be sure I understand what you're staying. Are you saying that it is a violation of law for the sheriff to issue a commission card, allow Stacy Burns to go to the C.L.E.E.T.

Academy and to ride with another senior deputy? A. What I'm saying —

Q. Yes or no, please. A. That is not against the law, no.

Q. Okay. And I believe, in taking your testimony down, you said that Mr. Burns needs the experienced or needs a seasoned officer to be with at all times, correct? A. He does, after training.

Q. Oh, he doesn't need it before training? A. Before training, they shouldn't allow him to be on the street.

Q. You shouldn't allow him to go with a seasoned deputy? Not in a uniform performing police duties.

[370] Q. But the law permits it? A. Even though the law permits it, yes.

Q. All right. One other thing that — as I understand your testimony, that that stop that night out on the highway, you said it was improper after they saw it was a misdemeanor, to ask the people to get out of the car? A. Would you repeat that question?

Q. Did you testify this morning that after the officers stopped a car and determine it's only a misdemeanor in Texas, that they should not ask them to get out of the car? A. I indicated they had no reason to believe it was anything other than a misdemeanor at the time they were engaged in the pursuit. And then if they felt that there were — there was a potential danger and threat from that particular vehicle, then they should have refrained from having both people exit the vehicle. And then the manner in which the approached the vehicle, even if they decided to do so, the manner in which they approached it was improper.

Q. Well, let me ask it again. We have the officers approaching, from Oklahoma, approaching a car in Texas and they only have observed a misdemeanor. Are you saying that they should not take any further action but let that car go? A. They can't legally take any further action.

Q. I'm sorry? A. They can't legally take any further action.

* * *

EXCERPTS OF TRANSCRIPT OF PROCEEDINGS — DIRECTED VERDICT

[407] * * *

THE COURT: You may be seated.

What says the Defendants at this time?

MR. JACK KENNEDY: We have various motions to make at this time, Your Honor, if we could.

THE COURT: All right. You may go ahead and make your motions.

MR. DAVID KENNEDY: Your Honor, may it please the Court, the Defendants move for a directed verdict on all counts brought by Plaintiff against Defendants on the basis that there is insufficient evidence and no evidence to support the elements of the cause of the action.

The Defendants, if they could address these first with regard to the allegations of Constitutional violations [408] under Section 1983 as against the County. The Defendants see the claims of Plaintiffs as being one for negligent hiring, training and supervision first. And Defendants would argue that such as to come from a showing of gross negligence amounting to a conscious indifference in its failure to train, hire and supervise Stacy Burns. And the evidence as been presented by Plaintiffs fail in this regard.

And further, the evidence that has been presented by Plaintiffs is as to allegedly one misconduct on the part of the County and that being the hiring by — the hiring and training supervision by B. J. Moore, the sheriff, who the Plaintiff has alleged as the policymaker.

It would be the position of the Defendant, we would refer the Court to the Supreme Court cases of *Oklahoma City vs. Tuttle* (spelled phonetically) as well as the *Langerand* (spelled phonetically) decision, that held that a municipality is not liable under Section 1983 for the negligence or gross negligence of its subordinate officials, including its chief of police in failing to train a particular officer in question in the absence of evidence of at least a pattern of similar incidence in which citizens were injured or endangered by intentional or negligent police misconduct and/or that serious incompetence or misbehavior was general or widespread through the police force.

The best or the closest that the Plaintiffs have [409] come to that so far is the opinion testimony of the expert that has been presented here today that is nothing more than conclusion. They presented no facts that there has been this pattern of misconduct which was a moving force for an alleged Constitutional violation of excessive force that night used against Ms. Brown.

An isolated incident, if we are to assume what Plaintiff says is truth and fact, looking at things most favorably for the Plaintiff, does not expose a county to Section 1983 liability, and that is the complaint and the only evidence that they have brought forth to this Court today. And, of course, Defendants dispute as to whether that — and deny that that incident showed one of excessive force, but in looking at the light most favorable to Plaintiff, if we are to assume that it did, that would not give grounds as to the County in this regard and that Defendant for the 1983 violation.

For custom to violates rights, one would have to show that there's a persistent wide-spread practice by the County officials to violate or by B. J. Moore to violate or negligently train, hire and which in turn was a moving force behind the excessive, alleged excessive force used on May 12th of 1991. And there is

a total absence of evidence and insufficient evidence in that regard.

Further, all the evidence that has been shown again [410] shows that the police officers were certified according to law and that that was a policy of the department. Every officer that was working that night and for the police department was a certified law officer in according with State law. And even their expert admitted that he has no evidence that they weren't certified according to State law. His opinion was merely that that's not sufficient, but that opinion should not expose the County to 1983, violation, for constitutional violation if, one, in fact, occurred, which Defendants deny that there is.

Defendants also move for a directed verdict on the grounds of tort claims for the alleged actions of the County as well as Officer Burns, based on his alleged conduct. To the extent that they claim that Sheriff Moore should have investigated Officer Burns further and hired and trained and supervised him better, such cannot form a basis of liability since an exception exists under the Oklahoma Tort Claims Act, Section 155 of the same, because it was a discretionary act on behalf of B. J. Moore who had the authority to hire and train and place if he sought to do so.

Subdivision 5 of Subsection — or at Section 155 of the Act clearly states and excludes liability based on a failure of Sheriff Moore in this case or failure to exercise — excuse me, if Sheriff Moore or any member of the Council for performance of or failure to exercise or perform [411] an act. The act here that they complain of in order to get liability as to the County would be that of hiring, training and supervising, but they failed to do that act. That, according to the Tort Claims Act, cannot expose that county to liability. That's an Act that is up to the sheriff, and as such, it is specifically provided under the Section 5 thereof, that it should not be a grounds for liability against the subdivision of the State of Oklahoma, this being the County of Bryan.

Also, an exclusion exists —

THE COURT: Mr. Kennedy, have you — I know we have a great many provisions of the Oklahoma Tort Claims Act, but have you furnished us that particular provision that you've just referred to, 155?

MR. JACK KENNEDY: I'm not certain, Your Honor Let me look at my notes. I can certainly give the Court the copy I have before me. I have the other one written down

THE COURT: Well, if you have a copy, just give it to Mr. Pascall there.

MR. DAVID KENNEDY: I'll do that, Your Honor.

THE COURT: Because I —

MR. DAVID KENNEDY: If I may continue on, Your Honor, and then I'll be able to pass this —

THE COURT: All right.

MR. DAVID KENNEDY: — there's also an exclusion [412] under the Tort Claims Act in which they are basing a commonlaw action of negligence or gross negligence for any acts or omissions done in conformance with then current recognized standards. That is Subdivision 28 of Section 155 which is also the exclusion section. And that is the basis for the questions to the expert just a few moments ago as to whether they did, in fact, comply with Oklahoma State law, C.L.E.E.T., which governs the standard by which officers are trained. And were they in compliance with C.L.E.E.T., when, in fact, they let Stacy Burns, even though the expert may have felt more needed to be done and more training needed to be had, but were they in

compliance with C.L.E.E.T. , and that was the issue. And his answer was yes, they were. In fact, even though he says he wouldn't allow on-the-job training, for instance, by Stacy Burns taking an automobile until he completed his training, in fact, the State law has stated that you may do so, that he may, in fact, get with other officers and travel with other officers as he was doing that night.

THE COURT: Let me ask you this, Mr. Kennedy. Hasn't an issue been raised as to whether or not the Sheriff was actually in compliance with the requirements, the state law requirements I'm saying, on May the 12th, as opposed, perhaps to sometime after that?

MR. DAVID KENNEDY: Your Honor, I don't believe an [413] issue has been raised in that regard that has anything to do with the problem —

THE COURT: You understand what I had reference to, certain documents being filed after May the 12th?

MR. DAVID KENNEDY: Yes, Your Honor. I'm aware and I guess the testimony here that was elicited at the end with regard to whether — as to the timing as to whether they were actually filed with 10 days, and I'm not sure I understand exactly the significance of the documents, but the testimony that came from the expert himself was that the current standards were hiring and training and supervising. Not as to when the document should be filed, but the hiring, training and supervising he had to admit is that as set by C.L.E.E.T., and that is the issue involved in this case, not when they filed a document, but rather was there a proximate cause, a moving force behind what Stacy Burns allegedly that night that somehow was evolved from the hiring, the training and the supervising of Stacy Burns. And their evidence their expert had to admit was if you go just by state law,

then so far as hiring, training and supervising, they complied. In this opinion, they had more to do. But so far as state law is concerned, they did comply in that regard.

And so in that regard, we would state that the then current recognized standard is Title 70, Section 3311, to which they complied with. And as a result, if that is a [414] current standard, there's a second basis under the Tort Claims Act as an exclusion for any liability to the County based on the actions of Stacy Burns, if, in fact, the jury were to find that he acted in negligence or gross negligence.

Next, Your Honor, that is with regard to the alleged liability under Section 1983 as to the individual, Stacy Burns. Defendants move for a directed verdict on the fact that there's no evidence or sufficient evidence to go to the jury on those causes.

The allegations against Stacy Burns who was riding in a patrol car and was driven to the scene by a certified officer, the allegations against Stacy Burns is that he used excessive force that night in the way that he handled the Plaintiff. Liability under those grounds, the issue is whether the force was grossly disproportionate to the need under the circumstances and was it inspired by malice rather than mere careless or unwise excessive zeal. And consistently, their own expert testified that he believes if he had been better trained or supervised, if they had checked better into his judgment, that sort of thing, that that may have led to the problem that night.

Those are all things that might fall under him being careless if we were to assume that that was the truth, that perhaps he was careless or excess zeal, but they don't show that he ever acted with malice. There's absolutely no [415] evidence that his force was grossly disproportionate. And, in fact, their expert so testified that the lowest level of force which is to be used if you

can't talk a person out of a car is the arm bar, and that's exactly what was used.

Her physician who she talked to, has stated that she was pushed to the ground. She has stated she was pushed to the ground or spun to the ground, and that's the evidence that is before the Court. We think that is insufficient evidence, no evidence that, in fact, there was excessive force, and their own expert has said that's the lowest level of force that can be used.

A law enforcement officer is justified in using force when and to the degree he reasonably believes the force is necessary to protect him or effect an arrest, and that is the standard we believe that liability could be imposed upon Mr. Burns, if at all. And the only evidence before this Court is the fact that he did reasonably believe that that force was necessary to protect himself and the others. There's no evidence that he with malice, exercising undue force, which would give grounds to 1983 liability.

Further, what was reasonable for Mr. Burns as he perceived the facts to be and how he perceived the facts to exist that night was there was a turn and a run from a roadblock. That's not in dispute. There was a chase that night, at least in the eyes of the officers who were chasing [416] Mr. Brown. Even if we were to assume Mr. Brown's statement that he wasn't running, the officers believed that they were in a chase and that's how it was perceived by Mr. Burns.

It was late night on a dark road off of Denison Dam.

The other officer, and according to what the evidence is, looking at it for Mr. Burns, the other officer, certified officer, has stepped out of the car, has drawn his gun and ordered the occupants to raise their arms. Mr. Burns has to take this situation as given to him and he has to react in that situation. He has

ordered the people out of the car. There's no dispute in that regard. So at that point, if, in fact, Mr. Burns, having gone through what he has gone through and seeing his fellow officer act in that regard who is certified and the people don't get out of the car, then it is what he perceives the facts to be justifiable force, that being what their expert has said, to be the lowest amount of force used to get the person out, handcuff her and immediately go to assist his fellow officer, which is the testimony of the Plaintiff. He didn't stand there, we don't have batons, being beaten, we don't have guns, being beaten. We don't have any of this. We have him immediately doing that and moving on to his fellow officer.

We would argue that hindsight is 20/20, but that's not the test. Instead, it is whether there's evidence [417] sufficient to go to the jury, as to whether that man perceived, Mr. Burns, that night, that he was acting with malice and disproportionate force under those situations in extracting the Plaintiff from the vehicle and handcuffing the Plaintiff. And we would suggest there is no evidence and insufficient evidence on the same.

And with regard to the common-law causes of action for negligence and gross negligence for any intentional conduct, if the same can be read in the pleadings, we would continue to insist upon the same basis as has been already stated to the Court, that there is no evidence and insufficient evidence on those grounds to go to the jury on the various causes of action which have been brought by the Plaintiff, and we would ask the Court to render a directed verdict on Defendants' behalf for those reasons, for those grounds.

THE COURT: All right. Thank you, Mr. Kennedy.

MR. DAVID KENNEDY: Thank you, Your Honor.

THE COURT: Who will respond for the Plaintiff?

MR. DAVID KENNEDY: Your Honor, if I may approach —

THE COURT: Just hand it to Mr. Pascall right behind you.

MR. WALKER: Your Honor, in regards to — I believe Mr. Kennedy raised four points. The first being in regards [418] to the 1983 action, no showing of gross negligence, in regard to hiring, training and supervision. I believe the testimony is clear from a certainly well qualified expert that there was certainly negligence and gross negligence in the hiring or selection of Stacy Burns and in the training and supervision of Stacy Burns.

In that regard, you were cited the cases of *Tuttle* and *Langerand*. Both of those cases were decided prior to the case of *Pinbyer vs. The City of Cincinnati* (spelled phonetically,) a U.S. Supreme Court case. And in that case, contrary to the contention of the Defendants that a single incident is not sufficient, the Court held that it is plain that municipal liability may be imposed for a single decision by municipal policymakers under appropriate circumstances. No one has ever doubted, for instance, that a municipality may be liable under 1983 for a single decision by its properly constituted legislative body, whether or not that body had taken similar action in the past or intended to do so in the future, because even a single decision by such a body unquestionably constitutes an act of official government policy.

The Court goes on to say that a government frequently chooses a course of action tailored to a particular situation and not intended to control decisions in later situations. If the decision to adopt that particular [419] course of action is properly made by the government's authorized decisionmakers,

it surely represents an act of official government policy as the term is commonly understood. More importantly, where action is directed by those who establish governmental policy, the municipality is equally responsible whether that action is to be taken only once or to be taken repeatedly. And that's what we have in this case.

A single decision by the stipulated policymaker for the Bryan County Sheriff's Department, for Bryan County in that regard, B. J. Moore's single decision, hiring Stacy Burns, it's been testified was the cause and proximate cause and was negligence and gross negligence resulting in the damages that Jill Brown has sustained.

In this case they talked about an instance where a decision or whether on not to enter a house to arrest a person within the house on a warrant was —

THE COURT: I don't think I need anything more on that, Mr. Walker. I'm interested in the Oklahoma Tort Claims Act.

MR. WALKER: Your Honor, I'm not familiar, that Section 155 and Section 28 has been called to the Court's attention previously or that that claim has been made. If it has been, that has been addressed in our brief and we would refer the Court to that.

[420] THE COURT: It's news to me, as I recall. I don't recall it ever having been raised in this case previously.

MR. WALKER: Your Honor, we would also perhaps question what protection the Tort Claims Act gives these officers in Bryan County when they routinely apparently set up roadblocks within a mile or two of the Texas line, apparently do not train their officers in regards to the pursuits into Texas. They

come into Texas and cause these injuries. I don't know that the Oklahoma Tort Claims Act has jurisdiction to extend and protect those officers for actually coming into Texas. And we would point that out to the Court in that —

THE COURT: Well, this case presents an interesting case as to what law is applicable. We started out in Oklahoma where I certainly think the Oklahoma law is applicable to the conduct of the police officers subject to the constitution of the United States and relevant laws. But then we get over into Texas where certain other conduct occurred and — do you have any thoughts on whether there's a — where the law changed, if it did change, that's applicable to this case?

MR. WALKER: I agree with the Court; it's interesting from a legal standpoint. But the actions that occurred in Texas that directly resulted in Jill Brown's injuries, there by the roadside obviously occurred in Texas. [421] And the testimony is that that was as a result of a county who selects someone such as Stacy Burns, with his history and background, and puts him in that position, and it was the result of the lack of training and supervision of that same officer, and also of Officer Morrison.

It may well be a unique situation, Your Honor. I certainly can't believe the law could be — all these things can occur and that a county anywhere in the United States can hire someone with a background and history such as Stacy Burns, not give him any training or supervision, and put him out on the road and these kind of injuries can occur without any redress for the person who is wrongfully injured.

THE COURT: Anything further?

MR. WALKER: Did you want me to respond in regards to the third and fourth portions?

THE COURT: Well, the court reporter is going to have to change paper. I think I will take a 15-minute recess and then hear the rest of that and during the recess, I'll be looking at this Oklahoma statute.

The Court will be in recess for 15 minutes.

(Recess from 2:25 p.m. to 3:04 p.m.)

THE COURT: Be seated.

Mr. Walker, you may conclude your response.

MR. WALKER: Your Honor, in regards to whether or not the Oklahoma Torts Claim Act provides any protection for [422] Bryan County in this case, I believe the evidence that's been presented so far, it's clear that roadblocks are set up habitually within a short distance of the Texas state line, that they provide no training to their officers in regards to pursuit, how to work with reserves, when they should pursue, how they should pursue, how they should stop. Whether they knew — they didn't know the laws applicable, once they entered into the State of Texas.

And once they entered into the State of Texas, they were outside their jurisdiction. They would have been acting as citizens although clothed in the — under the color of law of Bryan County sheriff's officers.

And in looking at Section 155, it says that the state or political subdivision shall not be liable if a loss or claim results from, and then to Section 28, acts, omissions done in conformance within current recognized standards.

That doesn't say that C.L.E.E.T. is the recognized standards. Dr. Schweizer testified, having been in Oklahoma for

the last four years and having been extensively trained in law enforcement, that the C.L.E.E.T. minimum standards are not sufficient and that any reasonable sheriff would have provided additional training, any reasonable sheriff would not have selected Stacy Burns, although Stacy Burns may have met the minimum requirements of State of Oklahoma law.

[423] Further, the state's minimum guidelines cannot be the recognized standard if they violate constitutional law. They can't result in unconstitutional deprivation of a citizen's rights or the public's rights.

In this situation, to apply Article 155, Section 28 as excluding the County from any tort liability claims would result in allowing states and cities across the country to pass laws that are unconstitutional and then exempt them from liability, therefore. And that's not permissible under federal law.

THE COURT: Anything further?

MR. WALKER: Not in regards to the Tort Claims Act, Your Honor.

Does the Court wish me to respond to Points 3 and 4 regarding 1983 as it applies to individuals and the common law of gross negligence and negligence claims?

THE COURT: I don't think so.

MR. WALKER: Thank you, Your Honor.

THE COURT: The Court is going to deny the Defendant's Motions for Judgement as a matter of law on the 1983 claims against both Defendants.

The Court is going to take under advisement for the time being the limitations set forth by Defendants and called to the attention of the Court in the Oklahoma Tort Claims Act. I'm going to — first time it's come up. I need to do [424] a little more research into it and I'm going to take that under advisement for the time being.

* * *

EXCERPT OF TRANSCRIPT OF PROCEEDINGS — BARNES TESTIMONY

[Commencing at Page 495]

turned away from the microphone.

BY MR. JACK KENNEDY:

Q. In order for you to be an instructor at C.L.E.E.T., must you have familiarized yourself with all of those various subjects that you told us about or do you take particular ones? A. Instructors are assigned particular courses to teach. In the almost 10 years I've been there, I've taught most of the courses. I don't generally teach self-defense, but I am the State's expert in patrol tactics and vehicle stops. We just recently made a national videotape on training for vehicle stops.

Q. Okay. What is the law under Title 70, Section 3311, with respect to the obligation of a deputy — obligation of a sheriff in Oklahoma toward employing someone to become a deputy? A. Under 3311, there is a specific set of standards that an officer must have, a person must have before he can be hired by an agency. He must be 21 years of age. He must have no conviction for a felony or an act of moral turpitude. He has to be commissioned by the department. He has to take a MMPI, which is a Minnesota Multiphasic Inventory, a psychological evaluation exam. It has to be graded. They are generally, once it's graded, if there is some problem with the officer, they will get back with the department. The officer must [496] complete the training, the basic academy training, certification training within one year of his employment date. So in other words, he has a year before he has to go to training under the state statute.

Q. After January the 1st, 1991, was there any change as to

additional training under C.L.E.E.T.? A. Yes, sir. As the Legislature enacted a new law effective January 1, 1991, stating that all officers must go to eight additional hours of training within the calendar year for the purpose of updating their abilities and skills.

Q. If a person has completed the necessary 320 hours of C.L.E.E.T. and has been certified to be a deputy, has he complied in all respects with the obligation of the Oklahoma statutes? A. Yes, sir.

Q. To act as a deputy? A. Yes, sir, I believe he has.

Q. Are there any written requirements that candidates be screened or screening process be set up before someone is employed? A. The statute indicates that they must do a background investigation and submit fingerprints to the Oklahoma State Bureau of Investigation and the FBI.

Q. Is that all? A. That's all the statute says, yes, sir.

[497] Q. And they have to be 21 years of age and have not been convicted of a felony? A. Yes, sir.

Q. Are there any standards in the year 1991 and previous as to state law having on-the-job training? A. There's nothing specific in the 3311 that denotes that OJ training must be done, on-the-job training, but many departments, even though the law states that they will not put people into the field without training, they provide OJT. They have a master and senior officer training programs. They have field officer training programs. So many of the agencies provide their own training as OJT and do not let them out on the street by themselves until they've had some training. And some agencies do not do so until after they come back from the academy.

Q. What has been — are you experienced as to whether or not there is people who go to the reserve academy, whether or not they're utilized by way of on-the-job training during that period of time? A. There's not any way that I would specifically know except that many departments, based upon my experience in dealing with them, they do provide training to their people and they get them to the academy, reserve academy as it applies, because an agency has to be willing to sponsor reserve academy before one that go on in the area. So

* * *

[516] Q. All right. What is your position with C.L.E.E.T.? A. I'm an instructor/coordinator.

Q. All right.

MR. WALKER: May I approach the witness, Your Honor.

THE COURT: You may.

BY MR. WALKER:

Q. Mr. Barnes, I want to hand you the deposition of Velma A. Gehrke, I guess, a records custodian for the C.L.E.E.T. training program in Oklahoma. Do you know Ms. Gehrke? A. Yes.

Q. Am I anywhere close to pronouncing — A. Gehrke, I think.

Q. I want to direct your attention to Page 3 of that deposition, Line 16, where the question was asked: When did Stacy Burns apply for training with C.L.E.E.T.? And the response to that was what? A. Looks like May 6th.

Q. All right, of 1991? A. Yes.

Q. And the following question was: When did Stacy Burns begin his training with C.L.E.E.T.? And what was that response? A. The same response it looks like.

Q. So at the time of this incident, there was at the most [517] six days that had expired that Stacy Burns had applied and began training with C.L.E.E.T., isn't it? Isn't that true? A. Yes.

Q. The six or seven weeks that you had projected is not accurate, is it? A. The —

Q. Is that accurate? A. Not according to that, no.

Q. You would agree that Ms. Gehrke is the custodian of the records for C.L.E.E.T.? A. Yes.

Q. And if Ms. Gehrke gave a sworn deposition and stated that fact, she would have access to the records and would have knowledge of whether or not that was the case? A. I believe so.

Q. Now, Mr. Barnes, if we're going to be honest with this jury, wouldn't you agree that Stacy Burns, on the night of May the 12th, 1991, did not have the training and experience to be in the position out there on Highway 1310, approaching a stopped vehicle, did he? A. No, sir, I don't agree.

Q. You're telling this jury that you believe Stacy Burns has sufficient experience to go out there and participate in what you've described as a high-risk stop on a dark lonely road?

* * *

[526] * * *

Q. I believe you had indicated to me that you don't know what B. J. Moore's hiring policies were at the time or if he had any? A. No, sir I do not.

Q. Do you believe B. J. Moore complied with the notice requirements of putting, when he hired people for his department? A. I really don't know specifically.

Q. All right. Did you know at the time of your deposition? A. I don't believe so. I may have, but I don't recall.

MR. WALKER: May I approach, Your Honor?

THE COURT: You may.

BY MR. WALKER:

Q. Mr. Barnes, referring you to Page 25, Line 11 of your deposition I'd asked you some questions in your deposition about, just as I'd asked you here, about your not being familiar with any hiring practices by B. J. Moore, is that correct? [527] A. Yes.

Q. And then I asked you: If he has any rules, you're not aware of them? And what was your response? A. I'm sorry, where are you at? I don't know what he has. I know he complied with 70, 3311 by sending in a notice that he had put people in his department.

Q. All right. That's — you're talking about the employment status report — A. Yes.

Q. — that's required to be filed and that's to be filed within 10 days of allowing someone to act as a sheriff's reserve or deputy? A. Yes.

Q. Do you still have that same opinion or do you know? A. That he filed the report, yes. He did file the report.

Q. Did he comply with the notice requirements as to when he was to file that report? A. You mean the time?

Q. Yes. A. No. Probably not.

Q. What is the purpose of these notice requirements? A. These requirements are for compliance that people hired on with the department are reported to C.L.E.E.T. so that they can open a record on the employer — employee, and that within 12 months he is to get his training or that he removed [528] from duty.

Q. All right. Isn't it a custom in Oklahoma for many times officers to lose their employment near the end of that 12 months and then begin their employment again shortly thereafter in order to avoid the training requirements of C.L.E.E.T.? A. It used to be, but that's been changed. When you first hire on now, the time clock starts. If you change jobs 22 times, it doesn't matter. Time starts on the first one.

Q. Part of this notice requirement allows C.L.E.E.T. to open up a file I believe you said on an individual? A. Yes.

Q. And included in that file would be criminal history checks? A. No, sir, not in C.L.E.E.T.'s file.

Q. C.L.E.E.T. has nothing to do or never receives the criminal history check of their applicants? A. They have an

application and it has the notation on there that they have checked, I believe, NCIC, or sent the prints out, but they don't get the actual record I don't believe.

Q. So C.L.E.E.T. never sees those records, is that what you're saying? A. Generally not, yes.

Q. Okay. You would agree that Sheriff B. J. Moore is [529] responsible for the acts of his deputies and his reserves in this case, wouldn't you? A. Yes.

Q. What are the requirements that C.L.E.E.T. requires, the minimum requirements that C.L.E.E.T. requires in regards to a criminal history of an applicant? A. I believe the application states that the agency head signs off on that he's sending, sent for the FBI and OSBI print check. There may be something else but I don't recall.

Q. Well, is it a requirement that you cannot become a deputy or a reserve in Oklahoma if you have a felony? A. Yes.

Q. Or a crime of moral turpitude? A. Yes.

Q. And you would agree with me that you believe that a crime of moral turpitude could include a driving under the influence, don't you? A. I think that's subjective.

Q. It could include that, couldn't it? A. Yes, sir, it could.

Q. In fact, that standing alone could be sufficient to prevent a person from being hired as a deputy or reserve, couldn't it? A. It should, yes, sir.

Q. And wouldn't you agree with me that a conviction for [530] driving while license suspended or two or three

convictions for driving while license suspended could also be considered a concern in deciding whether or not to hire an applicant as a deputy or as a reserve? A. It could be a concern, yes, sir.

Q. Particularly, wouldn't you agree that the combination of driving under the influence with several DWLS's, a combination would cause you probably a great deal of concern about an applicant, wouldn't it? A. Yes, sir. I would also look at the age.

Q. Would that, then, not trigger in you and any other reasonable person that maybe the background should be checked a little closer? A. On an unknown person, yes.

Q. All right. And if you checked the background a little closer, it's real easy in Oklahoma or Texas or any other state to get someone rap sheet, isn't it? A. Yes, sir, it is.

Q. And if you check that rap sheet and you found convictions for public drunk, several for driving while license suspended, for assault and battery, for DUI, for presentation of false identification, for numerous traffic citations, including reckless driving and careless and wanton driving, wouldn't that cause you some concern in whether or not you should allow that applicant to become a reserve or a [531] deputy? A. Yes, sir. However, some of those that you mentioned were misdemeanors and might not be on some of the rap sheets, because they generally list only felonies.

Q. You have to look a little bit harder, don't you? A. Yes, sir.

Q. When you look on the rap sheet, often times it does list those things, doesn't it? A. Not really sure. They mentioned changes a couple of years ago in the FBI reports where they only

wanted to list felonies, and they were sending FBI reports back, but the old FBI reports may, indeed, have misdemeanors on them.

MR. WALKER: Your Honor, may I approach the witness

THE COURT: You may.

BY MR. WALKER:

Q. Mr. Barnes, I want to leave with you for the moment Plaintiff's Exhibit Number 29. What is Plaintiff's Exhibit Number 29? A. This is the OSBI rap sheet.

Q. All right. And that document easily attainable by Sheriff B. J. Moore? A. Yes.

Q. And does that — well —

MR. WALKER: May I approach, Your Honor?

THE COURT: You may.

[532] BY MR. WALKER:

Q. Mr. Barnes, whose rap sheet is that? A. Stacy Steve Burns.

Q. You believe that to be the same Mr. Burns who is the Defendant in this case? A. I believe so.

Q. And what's the first arrest indicated on that rap sheet? A. 2/25/89, DUI, liquor or drugs, APCV.

Q. All right. And what is the next indicated arrest? A. 9/7 of '89, assault and battery.

Q. And the next? A. 1/4/90, traffic offense — I beg your pardon, excuse me. 9/7/89, resisting.

Q. All right. Hang on just a second. I want to make sure we get this accurate.

Let's back up to the second one. You mentioned the second one was an assault and battery? A. Yes.

Q. And what is the next one? A. 9/7/89, resisting officer.

Q. All right. And the next one? A. 9/7/89, public drunk.

Q. All right. I see you skipped an assault and battery charge here. A. That's the same charge.

[533] Q. It could be that that's two separate assault and battery charges that occurred on the same day, isn't it? It could have been two different complainants? A. I suppose it's possible. It's all under one listing from Cleveland County SO, but often you'll see it doubled up as in down here below, you see it doubled it up.

Q. And it's just as likely, as far as the knowledge that you have sitting here today, that there's two different complainants, isn't it? A. It's possible. Generally, they have two counts written out here or three counts if they're charging multiples.

Q. All right. What is the next offense? A. 1/4 of '90, traffic offense.

Q. And the next? A. 1/4 of '90, traffic offense.

Q. And the next? A. 1/4 of '90, traffic offense.

Q. And the next? A. 1/4 of '90, assault and battery.

Q. The next? A. 1/4 for '90, assault and battery.

Q. Next? A. 1/4/90, public drunk.

Q. The next? A. 1/4/90, traffic offense.

[534] Q. Next? A. 1/4 /90, traffic offense.

Q. And the next? A. 1/4/90, tax revenue.

Q. And the next one? A. Traffic offense, same date.

Q. And three more of those in a row? A. Three more of those in a row.

Q. And the next? A. 1/4/90, make sale, possession of false I.D.

Q. All right. And the next? A. Traffic offense.

Q. Then the rap sheet begins to list convictions, doesn't it? A. Yes, it does.

Q. And what's the first conviction listed? A. 1/4 of '90, pled guilty as charged to assault and battery, jail, 40 days.

Q. All right. And the next? A. 1/4 of '90, pled guilty as charged, make sale, possession of false I.D., $25 fine, suspended.

Q. The next? A. Pled guilty as charged, public drunk, 30 days.

Q. And the next? A. Pled guilty, was charged with operating a vehicle [535] without proper I.D. evidently. $100, suspended.

Q. And the next? A. Pled guilty as charged, driving with a license canceled. Suspended, 40 days.

Q. The next? A. Pled guilty as charged, speeding posted zone. $10, suspended.

Q. All right. And the next indication is what? A. 5/8 of '91, police applicant.

Q. All right. That would indicate an inquiry from someone requesting his rap sheet? A. Yes. It says Bryan County, Durant, Oklahoma.

Q. And that was on 5/8/91? A. Right.

Q. So it would appear that that request was made on 5/8/91 for that rap sheet, is that correct? A. I don't — can't tell that from this.

Q. Okay. A. It just shows it's a police applicant. They could have sent something in rather than request the rap sheet.

Q. All right. They can have those telefaxed to them, can't they? A. Yes, they can.

Q. Mr. Barnes, in regards to the DUI, I didn't hear you mention the disposition of that case. Do you see any [536] notation on that rap sheet of how that discussed was disposed of? A. No.

Q. Mr. Barnes, if you were a sheriff who was interested in hiring only proper people, with that type of history looking at you

in May of '91, wouldn't you have some concerns? A. Yes.

Q. And wouldn't you, particularly you see no disposition on some of the charges, for instance, the DUI. Wouldn't it be appropriate or reasonable for a sheriff, prior to putting someone on the street as a deputy or reserve, to check that out? A. Yes.

Q. And to check that out, all you'd have to do is call the county where that charge occurred, wouldn't it? A. Yes.

Q. And talk to the Clerk or the DA or somebody and asked them what happened? A. Yes.

Q. And if you did that and you found out that, in fact, the DUI was disposed of by a plea of guilty and the individual placed on probation, resulting in a conviction, would that again cause you concern about that applicant? A. Yes.

Q. And if you also found out in that same call that his [537] conditions of probation required him not to violate the law and you found that, in fact, a motion to revoke his probation had been filed for violating the law, wouldn't that cause you some concern? A. Yes.

Q. And if you found out that that motion to revoke had been filed and, in fact, a warrant had been issued and was outstanding at the time, that would cause you concern, wouldn't it? A. Yes.

Q. You wouldn't put that man on your law enforcement agency, put him on the street, would you? A. To be honest, I'm not really sure, but I'd say it would be doubtful, yes.

Q. Were you aware that on May the 12th, 1991, were you aware prior to today that Stacy Burns had a warrant outstanding for his arrest? A. No.

* * *

EXCERPTS OF TRANSCRIPT OF PROCEEDINGS — BURNS TESTIMONY

[Commencing at page 569]

Q. Would you please state your name to the jury? A. Stacy Steve Burns.

Q. Mr. Burns, what is your age? A. Twenty-three.

Q. And where were your born? A. In Durant, Oklahoma — in Denison, Texas. I'm sorry.

Q. And what is your birth date? A. April 11th, 1970.

Q. And what is your present business or occupation? A. I work at an insurance office.

Q. And what is the location of that office? A. That's in Durant, Oklahoma.

Q. And tell the jury, if you will, your educational background. A. I went to Durant High School. Graduated from Durant High School in May of 1988. I believe after that I attended Southeastern State University for possibly I believe that summer session there, if I'm not mistaken.

Q. I might ask you to speak out just a little bit, Mr. Burns. A. Then I went to the University of Oklahoma and attended several semesters there. And I've also attended some semesters at Oklahoma Christian College in Edmond, Oklahoma.

Q. And how long were you at Oklahoma Christian College? A. Three trimesters, I believe.

[570] Q. Okay. Was that before or after or during your going to school at Oklahoma University? A. That was, I believe, before. I'm not sure because I switched in between there, but I believe it was right before.

Q. Are you presently attending any school? A. Yes, sir, I am.

Q. And what school are you presently attending? A. Southeastern Oklahoma State University.

Q. And where is that located? A. In Durant, Oklahoma.

Q. Are you working and going to school? A. Yes, sir.

Q. What courses are you taking — what is your major that you're working toward? A. Criminal justice.

Q. What relation are you, if any, to Sheriff B. J. Moore? A. He is my uncle.

Q. And what relation are you to Joe Calclazier? A. That's my grandfather.

Q. To your knowledge, how long have those two individuals been in law enforcement? A. I believe Joe Calclazier has been in for 16 years, if I'm not mistaken, and B. J., I have no idea. I know he was a deputy for quite awhile before he was the sheriff of Bryan County.

[571] Q. Is Mr. Moore commonly called B. J.? A. Yes, sir.

Q. Now, prior to your going off to college — let me ask you this: After you got out of high school, what work or educational

pursuit did you first do? A. I worked there in the Durant area at two furniture stores during the time that I stayed in Durant after graduation.

Q. What furniture stores did you work with, if you recall? A. For Collier Brothers Furniture and for Home Furniture Company.

Q. And what did you do for them? A. General delivery and sales.

Q. Kind of a "go-fer?" A. Basically, yes.

Q. All right. And you got out of high school at what age? A. At 18.

Q. And then when did you go to your first college course, at what age? A. I believe it was that semester, so I believe it would have been 18. I think I might have taken one summer course there at Southeastern.

Q. Okay. After you got out of high school, you took the summer course and then where did you next go? A. For college?

[572] Q. Yes. A. I went to Norman, Oklahoma to the University of Oklahoma.

Q. Now, as a kid growing up in Durant, from the time that you were born until you were 18, tell the jury what problems you had with the law, if any, during that period of time? A. During the time up to I was age 16, I had no problems with the law at all. Then whenever I turned 16, I've had — I've had quite a few traffic tickets, quite a few speeding tickets.

Q. In other words, you drove too fast? A. Yes, sir.

Q. Failed to stop at stop signs, that sort of thing? A. Yes, sir, things of that nature.

Q. Okay. Now, when you went to Norman, was that in 1988, the first time? A. I believe it would have been the latter part of '88 and the first part of '89, I think.

Q. All right. Now, they have made inquiry about you having a DUI in Marshall County, I believe. Is that correct? A. It was not a DUI. It was an APC.

Q. Would you please slowly explain to the jury what an APCV is? A. Okay. Well, the difference between a DUI and an APC, a DUI, the officer sees you driving and the officer, you know, [573] picks you up while you are driving and pulls you over. And an APC, you're necessarily sitting in a car somewhere and had been drinking and they pick you up for that purpose.

Q. Okay. At the time you were arrested in Marshall County, were you driving your automobile or were you on the side of the road asleep? A. I was sitting on the side of the road asleep.

Q. And why did you pull off to the side of the road? A. I realized I had had too much to drink and I couldn't drive all the way back, so I just pulled over.

Q. All right. And did the law enforcement authorities of Marshall County take you to jail? A. Yes, sir, they did.

Q. Now, you have been — let's go on further. After that incident, where did you — did you continue at school at Oklahoma University? A. Yes, I did.

Q. And during the time that you were at the University of Oklahoma or elsewhere, did you violate traffic laws? A. I'm sure I had some traffic offenses in between that.

Q. Okay. During your years as a teen-ager, did you on numerous occasions violate traffic laws? A. Yes, sir, I did.

Q. Did you drive while your license was under suspension? A. Yes, sir.

[574] Q. What other traffic laws do you recall that you violated while — before January of '90? A. Well, as I said, I had several driving, or I had driving under suspension and several traffic tickets. I believe on there also might have been for an expired tag and things of that nature. That's been five years ago. I don't recall everything on there.

Q. Now, the Counsel has asked the past witness about things that occurred on January the 4th, 1991. Do you recall that? A. Yes, sir.

Q. The events that he asked about on January of 1991, did they occur in January of 1991 or did they occur at a prior time? A. They occurred late in 1989.

Q. Where? In what county? A. In Clayton County in Norman, Oklahoma.

Q. Is that the university of Oklahoma? A. Yes, sir.

Q. In September of 1990, excuse me, in September of 1989, did you get in a fight on the campus? A. Yes, sir, I did.

Q. And what were the facts concerning that fight that you got into? A. Well, I was driving through a parking lot there

right across from the campus, across from the dorms, and a group of [575] fraternity guys, pledge class, were walking across the street. And I was driving down the street and several of them, or one of them, possibly, hit my car.

Q. All right. Then what happened as you recall? A. Then I believe I stopped the car and I did get out of the car and asked them why they were hitting the car and why they were acting the way they were. Several of them jumped up and started pushing on me so I in turn did the same thing.

Q. You had a fight, is that correct? A. Yes, sir.

Q. And were you charged with assault and battery? A. Yes, sir.

Q. Now, was that assault and battery charge against you for that event settled then or was it settled in January of '90? A. It was settled in January of '90.

Q. Counsel read off a long list of things that occurred in January of '90. Tell the jury whether or not all of those occurred at the same time or at subsequent times? A. They all occurred at the same time. They were all taken care of at one period in time.

Q. I'll ask you whether or not Mr. Calclazier was around at the time this — the judge did whatever he did? A. At the time we went to Court, yes, sir.

Q. Okay. And did you plead guilty to the assault and battery and the traffic violations? [576] A. Yes, sir, I did.

Q. And what was your age at that time? A. I believe I was still 18 or I may — no, I believe I had turned 19.

Q. All right. Now, during your lifetime up until May of '91 when this event occurred, how many fights have you gotten to that you can recall? A. Probably two in my entire life.

Q. Had you ever, prior to May of '91, been charged with fighting or that sort of thing that you recall, in Durant? A. May of '91?

Q. Yeah. The time this event happened? A. Oh, no, sir.

Q. Have you ever been charged and convicted of a felony? A. No, sir, I have not.

Q. When you were a teen-ager, did you drive badly? A. Drove very fast.

Q. Do you believe that that affects your ability to serve and try to become a reserve deputy? A. No, sir, I do not.

Q. Now, when Counsel asked you about you having been arrested in your deposition, were you totally truthful with? A. No, sir, I wasn't.

Q. Why not? [577] A. The assault and battery convictions, nobody — nobody knew about those and that was really something that I was trying to live down, that I didn't want anybody to know, and I didn't — I wasn't truthful about the assault and batteries .

Q. When did you decide to try and become a reserve deputy? A. I believe in possibly the summer of 1990. I had thought about it and talked to my grandparents about it.

Q. Okay. And what did you do, then, to try to make, take whatever steps necessary to become a reserve

deputy? A. Well, I had talked to my grandfather about it and talked to B. J. both, and asked them about reserve academies and what they were like and how long they would last and what they consisted of, and also where they were at.

Q. Okay. A. And —

Q. And is your grandfather a reserve deputy? A. He is a special deputy.

Q. Special deputy. And to your knowledge, has he been a deputy for 16 years? A. Yes, sir, he has.

Q. Do you recall when you started going to C.L.E.E.T.? A. I could not give you the exact date.

Q. All right. Tell the jury what C.L.E.E.T. is, as you utilized it?

* * *

[600] A. Yes, sir, I do.

Q. During the period of the time that you have gone to college after high school, have you or not always tried to maintain a job? A. Yes, sir, I have.

Q. Where are the different places you have worked at Joe Coker Pontiac/GMC, selling cars. A. I've worked at Charleston's Restaurant as a waiter and a bartender. I've worked at Newman Chevrolet, again selling cars. I've worked at the insurance office during various insurance work and things of that nature.

Q. All right.

MR. JACK KENNEDY: I pass the witness.

THE COURT: You may cross examine.

CROSS EXAMINATION

BY MR. WALKER:

Q. Mr. Burns, how long had you been working for Bryan County at the time of this incident? A. I do not recall the exact length of time.

Q. How long had you been attending the C.L.E.E.T. Academy at the time you began or as of May the 12th, 1991? A. As of May the 12th, I'm really not for sure how long we had been there. It's been quite awhile ago.

Q. Is it true that at the time of the incident of May the 12th, 1991, you had received no training from the Bryan [601] County Sheriff's Department? A. I had watched the LETN, but no formal training, no.

Q. Well, you recall I took your deposition, don't you? A. Yes, sir, I do.

Q. And you've told this jury there were some things during that deposition that you didn't want us to know? A. Correct.

Q. Did you not want us to know that you had watched these LETN programs? A. No, sir. I was just speaking of formal training. I thought that's what you were talking about when you asked me that.

Q. Well, the question specifically that I asked you — you've read your deposition in preparation for your testimony today, haven't you? A. Yes, sir.

Q. The specific question I asked you was whether nor not you had received any training through Bryan County prior to this incident, wasn't it? A. Yes, sir.

Q. And your answer was no, wasn't it? A. Correct.

Q. But you want to tell this jury now that you had some additional training that you didn't want me to know about? A. I just watched the LETN. That's basically it.

* * *

[602] Q. You had no experience as a patrol officer prior to beginning your work as a reserve with Bryan County, had you? A. No, sir.

Q. And during the entire length of your deposition, you never told me that you had worked there as a dispatcher or had any other involvement with Bryan County, did you? A. No, sir.

Q. You had received no training regards the roadblock procedure from Bryan County, had you? A. No, sir.

Q. You received no training in regards to the pursuit across state lines? A. No, sir.

Q. Isn't it obvious to you that if law enforcement officials were going to set up roadblocks near a state line in what you've described as a high crime area, that those officers manning that roadblock should be trained or receive training regarding pursuits?

MR JACK KENNEDY: I'm going to object. It's speculative, unless he wants to utilize this man as an expert. I object to it otherwise as speculative, asking for him to —

THE COURT: Well, I believe his relation to the incident is such to where he can express an opinion on that. Overruled.

[603] A. I don't know whether they should or not.

BY MR. WALKER:

Q. All right. At the time of the incident, you had received no training in regards to your authority to arrest in Texas, had you? A. No, sir.

Q. The night that this incident occurred, there was no one that was placed in charge of you, were there? A. The person that I was riding with was more or less in charge of me.

Q. Now, that's not what you indicated to me in your deposition, did you? A. I don't recall.

Q. How old were you back in May of 1991? A. Twenty-one, I believe.

Q. And as I understand it, the only restrictions placed upon your were that you were not to carry a gun or to drive a police car? A. Yes, sir.

Q. Otherwise, Brown County had authorized you to perform all other acts of a police officer? A. Any that that police officer told me to do, yes.

Q. No one told you to go get into the patrol car and join in this pursuit, did they? A. No, sir.

[604] Q. No one told you to exit the patrol car after the stop was made, did they? A. Not to my recollection, no.

Q. No one told you to go to Jill Brown's side of the pickup, did they? A. Not to my recollection.

Q. No one told you to extract Jill Brown from the vehicle, did they? A. Not to my recollection, no.

Q. No one told you to take Jill Brown to the ground and handcuff her, did they? A. No.

Q. Did you believe you were authorized to take those actions? A. Yes, sir, I did.

Q. And you'd been authorized to perform those acts by B. J. Moore, hadn't you? A. Yes, sir.

Q. What were you wearing there on May the 12th of 1991? A. On that evening, I had a sheriff's shirt on, a badge, bluejeans, a pair of boots, I believe, and a gun belt.

Q. You appeared to be a Bryan County Sheriff's Deputy? A. Yes, sir, I did.

Q. Where had you gotten the badge? A. I believe I got that from the sheriff's department. I'm

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[613] * * *

BY MR. WALKER:

Q. You believe you're an honest person? A. For the most part, yes, sir.

Q. Well, you recall in your deposition I asked you to tell me about all the times you'd been arrested? A. Yes, sir, I do.

Q. And you didn't do that, did you? A. No, sir, I did not.

Q. In fact, I asked you three times, didn't I? A. I do not recall how many times. You may well have.

Q. Even here today, you hadn't told the jury of all the arrests that you've had, have you? A. All the ones, I believe so, yes, I have.

Q. I didn't hear you tell the jury about being arrested for having a false identification. [614] A. I believe that was already — that was already mentioned.

Q. All right. But when you told — when Mr. Kennedy asked you about you denying the arrest as not being true, you didn't tell us about that, did you? A. I don't — they don't arrest you for having a false identification. I believe I just had that whenever they arrested me at one point in time. That's not a jailable offense.

Q. Is public drunk a jailable offense? A. Yes, sir.

Q. Were you arrested for that? A. I — I believe at the same time as everything else, yes, sir, I was.

Q. You didn't tell us about that, did you? A. No, sir, I did not.

Q. You didn't tell us about resisting arrest, did you? A. No, sir, I did not.

Q. Are you telling us in regards to the driving under the influence charge that's contained on your rap sheet, that you did

not actually plead guilty to a driving under the influence but pled guilty to a lesser charge of being in control of a motor vehicle while intoxicated? A. To an APC, yes, sir.

Q. All right. That basically means that the officers are [615] saying that they didn't, or they can't prove that you were driving the vehicle at the time? They didn't catch you?

MR. JACK KENNEDY: You Honor, I object. That's an improper question. He's asked a legal question as to what the officer can do or not do. He can only ask him fact questions.

THE COURT: Sustained.

BY MR. WALKER:

Q. Well, you told the jury, you want the jury to believe that you had pulled over because you were intoxicated? A. Yes, sir, I did.

Q. So you had been driving while intoxicated? A. For about half a miles, yes, sir.

Q. Okay. Now, after we took your deposition, you read that deposition carefully, didn't you? A. Yes, sir, I read over it.

Q. Made some changes in it? A. Yes, sir, I did.

Q. Sent those back? A. Yes, sir, I did.

Q. And at that time you didn't tell us about all these other charges, did you? A. No, sir, I did not.

Q. After documents were filed in this Court accusing you of committing perjury, did you then respond and correct your [616]

deposition again? A. I didn't ever see any documents accusing me of committing perjury, but I did correct my deposition.

Q. And how long ago was it that you made these corrections? A. I don't recall.

Q. Was it within the last couple of weeks? A. I really don't recall. It may well have been.

Q. Was it in the last couple of months? A. I do not recall.

MR. WALKER: May I approach the witness, Your Honor?

THE COURT: You may.

BY MR. WALKER:

Q. Do you remember making, although you don't remember when, do you remember making the corrections or changes to your deposition and telling us about some additional arrests that you hadn't told us about in the deposition? A. I told Mr. Kennedy about them, yes.

Q. And did you sign a document making those changes in your deposition? A. I—I may have. I don't recall, sir, for sure.

Q. Well, if you had of made those changes, do you know where you would have been, where did you go to sign those documents? A. I'm sure it would have been in Mr. Kennedy's office.

* * *

[618] * * *

Q. You have been arrested for resisting arrest, haven't you? A. I do not recall. I may have been.

Q. It wouldn't surprise you, would it? A. I know at that point in time that they arrested me for that assault and battery, there were other charges that were with that one, but the main arrest complaint there was the assault and battery and that was the charge that was filed.

Q. You'd forgotten about the resisting arrest? A. If it was there. I didn't even know if it was on there.

Q. While you were on probation for this APCV? A. APC, yes, sir.

Q. While you were on probation for that offense, were you under conditions of probation that required you not to violate the law? A. At that point in time that I got the APC, I went to Marshall County and talked to the Judge there and —

Q. Mr. Burns — Mr. Burns, my question was while you were [619] on probation for APCV, were there conditions of your probation that required you not to violate the law? A. I was trying to explain the conditions of the probation but I didn't get there.

Q. Well, were you — was one of the conditions that you were not to violate the law?

MR. JACK KENNEDY: Your Honor, I object to Counsel — he's already answered the question as best he knows. It's argument now.

THE COURT: Well, overruled, but he may explain his answer.

A. What I was suppose to do for Marshall County was go over there and do some undercover drug buys for the Marshall County Police Department and I would not have to pay any charges nor probation nor any other thing like that.

MR. WALKER: Your Honor, we object to the responsiveness of the answer and ask the jury be instructed to disregard. The question was whether or not one of the conditions set out in this probation were that he was not to violate the law.

THE COURT: Sustained. The jury will not consider the answer for any purpose.

BY MR. WALKER:

Q. Were one of the conditions of your probation that you were not to violate the law? [620] A. On that time, sir, I had no probation, to my knowledge, whenever I first got the APC.

Q. This occurred over in where, Marshall County? A. Yes, sir, in Madill, Oklahoma.

THE COURT: Do you have another question, Counsel?

BY MR. WALKER:

Q. How long were you placed on probation? A. I — I don't recall the probation, so I don't know how long.

MR. WALKER: May I approach, Your Honor?

THE COURT: You may.

BY MR. WALKER:

Q. Mr. Burns, I want to show you what's been marked for identification purposes Plaintiff's Exhibit Number 31. Does this appear to be the record from Marshall County regarding your APCV? A. Yes, sir, it does.

Q. And did you see these documents and receive these documents while you were at Court on this APCV? A. I do not recall. That was back in '89.

Q. All right. Well, I want to direct your attention to a document titled Misdemeanor Judgement and Sentence with order suspending execution of sentence and ask you to review this document and tell the jury whether or not it sets out certain conditions that you were to comply with while you were on [621] probation?

MR. JACK KENNEDY: Your Honor, I'm going to object to the form of the question. If he's asking what the document shows, I have no objection. If he asks what the Judge told him, I object to him being restricted to the document. So I think the question should be specific so I can make my objection, if he's asking — if I've made my objection understandable to the Court. If he's asking what the document says, I have no objection. If he's asking what the Court told him, I object.

THE COURT: Well, you might rephrase your question. My understanding of the question, he's asking what the document —

MR. WALKER: That's correct, Your Honor.

MR. JACK KENNEDY: I have no objection to that.

THE COURT: What the document says.

A. The document, as I read it, it says that I shall not violate any state, city or federal law, that I will not consort with people having a criminal record nor will I use intoxicating liquor or beer. And that I shall pay a certain fine, which the fine I don't see as listed there. And that I am to do three days of community service.

BY MR. WALKER:

Q. All right. And while you were on that probation, you didn't comply with those conditions, did you? [622] A. I did not know of the probation at that point in time, so I — no.

Q. You did not know you were on probation? Is that your testimony? A. There were other agreements along with that one.

Q. In fact, Marshall County filed a motion to revoke your probation, didn't they? A. I later learned during this that they did, yes.

Q. All right. And in fact, an arrest warrant was outstanding for you at the date of this incident, on May the 12th of 1991? A. Yes, sir, it was.

Q. Have you since been arrested on this matter? A. No, sir, I have not. I went and talked to the Judge and he —

Q. My question was have you since been arrested — A. No, sir, I have not.

Q. Have you since taken care of this matter? A. Yes, sir, I have.

Q. Did you take care of this matter last week? A. I — I don't believe it was last week, no.

Q. The week before? A. It quite possibly could have been. I'm not for sure of the exact date.

Q. Thank you. Now, you knew you were under oath at the [623] time we took your deposition and asked you all these questions about your prior history, didn't you? A. I do not recall. I'm sure that I did know at that point in time, yes.

Q. And even though you were under oath, you didn't tell the truth, did you? A. No, sir, I did not.

Q. And I believe you said that was because there were certain things you didn't want us to know? A. That I didn't want my family to know, yes, sir.

Q. Your family wasn't in the room, were they? A. No, sir, they were not.

Q. You've told the jury that you've had two fights your whole life? A. That's correct.

Q. Does that include the one that you were arrested for? A. Yes, sir, it does.

Q. And pled guilty to? A. Yes, sir.

Q. Paid — sentenced to 40 days in jail or something? A. Seventeen days.

Q. And who was your other fight with? A. It was when I was a freshman in high school. I don't — I don't recall who it was with.

Q. Are you intending to impress upon this jury that you do [624] not have a history of physically aggressive behavior in the past? A. I do not. Other than those two fights, I do not.

Q. Are you trying to tell this jury that you do not have a predisposition for being a physically aggressive person? A. I do not.

Q. Are you trying to impress upon this jury that you do not have a temper? A. I'm sure I have a temper. Everyone has a temper.

Q. Are you trying to impress upon this jury that you believe you do not have a hot temper? A. I do not.

Q. And you've told this jury you had no reason to be mad at Ms. Brown? A. That's correct.

EXCERPTS OF TRANSCRIPT OF PROCEEDINGS — MOORE TESTIMONY

[Commencing at page 642]

after which the following occurred:)

THE COURT: Now, ladies and gentlemen of the jury, I'll instruct you to disregard any statements made by the witness about the financial condition of Bryan County, not consider them for any purpose at this time. I'll instruct the witness to only answer the question that is asked and not volunteer non-responsive answers.

THE WITNESS: Yes, sir.

BY MR. JACK KENNEDY:

Q. Now, we were going into the deputies that you hired. How many — during your four years as sheriff, how many deputies did you hire? A. I believe I hired six or seven.

Q. All right. And if you will, who was the first deputy you recall hiring? A. Bob Wallace.

Q. And what is Bob Wallace's — what investigation did you make to determine the viability or the ability of Mr. Wallace to make the sheriff department? A. He was working — he was a past deputy, detective in the sheriff's office when I took over.

Q. So he was already a deputy in the sheriff's department when you took over? A. Yes.

Q. Was there any necessity of you having to make any [643] further investigation into his background before letting him work for you? A. No.

Q. Okay. Had you known Mr. Wallace over the years? A. I had known him quite awhile, yes.

Q. Was he, in your judgment, an experienced, capable officer? A. Yes.

Q. Who was the next one you employed? A. Bill Adams.

Q. And what was the situation in hiring Mr. Adams? A. He had worked for the past sheriff and he had — he wasn't working for him at the time I took over, so — but he was certified, and I had worked with Bill Adams when I was working with the DA's office, and he was qualified. He was state certified.

Q. Was Mr. Adams a capable deputy sheriff? A. Yes.

Q. And then who was the next deputy that you employed? A. Delores Simpson.

Q. Simpson? A. Simpson, yes.

Q. And tell the jury the circumstances by which she was employed? A. She had worked for the past sheriff and I had worked [644] with her on several cases when I was with the district attorney's office, and she was state certified.

Q. Okay. That's the female deputy sheriff we mentioned a moment ago? A. Yes.

Q. All right. And so she was a certified deputy sheriff at the time you became sheriff? A. Yes.

Q. Who was the next one you employed? A. Earl Howell.

Q. And what were the circumstances for employment Mr. Howell? A. Mr. Howell had worked with the Durant Police Department for several years. He was a certified police officer. He was a good officer, so I hired him to become a deputy.

Q. Okay. And was and is Mr. Howell a good, capable deputy? A. Yes.

Q. Who was the next one you employed? A. I believe the next one was Larry Brown.

Q. What were the circumstances of employing Mr. Larry Brown? A. He was — he worked in the jail when I took over as sheriff. He transported prisoners. I did send him to C.L.E.E.T. and he got certified, and he was put on the street.

[645] Q. And did — you knew of his background at the time he was employed, is that correct? A. Yes. He worked in the jail? Yes, he worked in the jail —

Q. And was certified thereafter to become a deputy sheriff? A. Yes.

Q. Was he a good and capable officer during the time you were sheriff? A. Yes.

Q. And who was the next one you employed? A. Jesse Carlisle (spelled phonetically.)

Q. And tell us the circumstances of employing Mr. Carlisle? A. He was jail administrator for — he was jail administrator when I took over as sheriff. He worked there for quite a — couple or three years. He was sent to jail school. He quit and went to work for Colbert, a local town, as a town marshal. They sent him and got him certified. And then when he come back from school, he worked awhile with Colbert and then I hired him as a deputy.

Q. And was Mr. Carlisle a competent deputy sheriff? A. Yes, he was.

Q. And who next did you employ? A. Jim LeBuff.

Q. And tell us the circumstances of hiring him? [646] A. He was — he took over as jail administrator when Jesse Carlisle quit and went to work for Colbert. He worked there as jail administrator for approximately a year for me. I sent him to school and got him certified and he was put on the street.

Q. And was Mr. LeBuff a good and capable deputy? A. Yes, he was.

Q. Who next did you employ? A. Robert Morrison.

Q. That's the one who previously testified in this case? A. Yes.

Q. And what were the circumstances on employing Mr. Morrison? A. I needed a deputy. Mr. Morrison, he was brought to my attention and we run a background check on him. He had worked for McAlester as a deputy sheriff. We called the sheriff in McAlester or Pittsburg County. He highly recommended him. He had worked as a police officer in Colgate, Oklahoma. We called there. They highly recommended him. He

was certified as a police officer through C.L.E.E.T., so I put him to work.

Q. And was Mr. Morrison a capable and experienced deputy sheriff? A. Yes, he was.

Q. Anyone else that you were called on to employ as a [647] deputy sheriff? A. Not that I can recall.

Q. During the tenure of your office, is it true or not that each deputy that worked in your department as a patrolman on duty was a person qualified under state law and a seasoned, capable deputy? A. Yes.

Q. What is your relationship with Mr. Stacy Burns? A. He was my nephew's son.

Q. And what do you know — can you tell us about your knowledge of him as a child growing up in Durant? A. I wasn't around him that much when he was growing up. I know as he got a little older and he got him an automobile he was — he liked to hotrod a lot. I know he got several tickets on that.

Q. To your knowledge, so far as what you knew, you can only testify to that, did he have a reputation that you knew of as being overly aggressive or fighting or things of that nature? A. Not that I know of, no.

Q. Okay. Did you know at the time he wanted to become a reserve deputy, did you know of anything that would be something that would not allow him to become a good deputy? A. No.

Q. There have been testimony here of him having gotten in fights in Norman and APCV, whatever that is, in Marshall [648]

County. Did you know of any of those at the time that he went as a reserve deputy? A. I did not know of the fight he had in Norman. I — I did — I was aware — I had heard of the trouble he had in Marshall County, yeah.

Q. The APCV or DUI or whatever it was? A. APC.

Q. Let me ask you this, Mr. Moore. As a person with 16 years of law enforcement, what is your belief as to whether or not a young man with the background that had been shown to be with Stacy Burns, has upon his right and ability to become a good police officer? A. Well, there's a lot of police officers that's — that's had fights and probably speeded and got tickets, and there's a lot of people that — almost everybody has had fights before in their life. And I don't think, you know, assault and battery, simple assault and battery would stop anybody from being a good police officer, if that's what they want in life.

Q. What is your opinion as to whether or not a person who is becoming a police officer has to be, has to have some aggressiveness in order to be a good police officer? What is your feeling, your experience as to whether or not any person who wants to become a police officer has to have a certain amount of aggressiveness in-order to be a proper police [649] officer? A. Well, they just have a lot of — a lot of willpower and a lot of courage to want to be one. You know, you have to love the job.

Q. Now, what is the highest crime rate area of Bryan County? A. Cartwright area.

Q. Has it over the years developed a reputation for crime? A. Yes, very bad.

Q. How long have you known of that area? A. Well, it

really become bad when — back when Perrin Field was here.

Q. When the air base was here? A. It was all beer joints and killings and all sorts of things.

Q. Okay. Now, I'd like to ask you about your practice as a sheriff in Bryan County as to the using of roadblocks. Have you done that in the past? A. Yes.

Q. First, why? A. Well, we tried to have roadchecks to eliminate people that was — would be drunk or drinking in an automobile or driving with their license under suspension. Any element of crime we tried to stop.

Q. Where do you normally put roadblocks in a county?

* * *

[666] Q. All right. And so at that time, would your squad car have been seen if somebody wanted to see it, there in front of the the premises? A. Yes.

Q. All right. Sheriff Moore, during your four years as sheriff of Bryan County, has anyone ever made an accusation against you or members of your patrol unit for police misconduct? A. No.

Q. Has anyone ever made a complaint against the Bryan County Sheriff's Department Patrol Division as to being abusive to people when they were being stopped out in the county in any way? A. No.

Q. During your entire tenure as a police officer, did you comply with all of the standards, training regulations and statutes for the State of Oklahoma? A. Yes.

MR. JACK KENNEDY: Pass the witness.

THE COURT: You may cross examine.

CROSS EXAMINATION

BY MR. WALKER:

Q. Mr. Moore, the purpose that you went on the property for regarding the — with the health department that I believe you said did not pertain to Todd or Jill Brown at all, is

* * *

[671] incident, you saw Ms. Brown and at that time she, to the best of your recollection was at least on crutches? A. I believe she was, the best I can remember.

Q. All right. And then again, two weeks later when you've told the jury you arrested Todd Brown on another unrelated charge, it's your testimony that Jill Brown rode to the jail with you and Mr. Brown? A. Yes.

Q. And Jill Brown wasn't under arrest, was she? A. No.

Q. Did you feel like you couldn't leave her at the scene because she was unable to drive that truck? A. Well, it was — you know, that was up to her.

Q. All right. A. She could have stayed there if she wanted to or she could ride to town.

Q. Right. But you told me in your deposition that it appeared to you at that time that Jill Brown wasn't in condition

to drive that truck, is that correct? A. Well, she had a cast on her leg, yes.

Q. All right. Now, in this case you made the decision to hire Stacy Burns, didn't you, as a reserve? A. I beg your pardon?

Q. You're the decisionmaker for Bryan County in regards to the Bryan County Sheriff's Department, aren't you? [672] A. Yes.

Q. Or you were at the time on May the 12th of 1991? A. Yes.

Q. And pursuant to your being the decisionmaker for Bryan County, did you make — it was your decision to allow Stacy Burns to act as a reserve, wasn't it? A. Yes.

Q. And you told the jury that you were aware that Mr. Burns had a bad driving record and that he had had this APCV, is that correct? A. Yes.

Q. All right. At the time we took your deposition, you referred to it as a DUI, I believe, is that correct? A. Well, an APC and DUI is treated the same way.

Q. Closely linked, aren't they? A. Well, I mean, they're — well, the penalty and everything would be the same, yes.

Q. And how did you obtain that information? A. I don't remember now how I got it.

Q. Did you make an inquiry with the proper authorities in Oklahoma to get a copy of Mr. Burns' rap sheet? A. I run his driving record, yes.

Q. All right. And you can get that rap sheet immediately, can't you? A. It don't take long.

[673] Q. All right. And did you not see on there where Mr. Burns had been arrested for assault and battery. Did you see that one on there? A. I never noticed it, no.

Q. Did you notice on there he'd been arrested or charged with DWLS on several occasions? A. Had been done what on several occasions?

Q. Had been arrested for driving while license were suspended? A. I'm sure I did.

Q. All right. Did you notice on there that he'd been arrested and convicted for possession of false identification? A. No, I never noticed that.

Q. Did you notice on there where he had been arrested for public drunk? A. He had a long record.

Q. Did you notice on there where he had been arrested for resisting arrest? A. No, I didn't.

Q. Did you make any inquiries after you got that information to determine exactly what the disposition of those charges were? A. No, I didn't.

Q. Did you not make any attempt to find out the status of [674] Mr. Burns' criminal record at that time? A. As far as him having a criminal record, I don't believe he had a criminal record. It was just all driving and — most of it was, misdemeanors.

Q. Well, did you make any attempts to determine whether or not Mr. Burns was on probation at the time you placed him out there? A. I didn't know he was on probation, no.

Q. Did you make any effort to find out? A. I didn't have no idea he was on probation, no.

Q. Well, you saw on his rap sheet where he had been charged with DUI, didn't you? A. I had heard about that. I don't remember whether I had seen it on the rap sheet or not.

Q. So you'd heard about it? A. I'm thinking I — I don't know.

Q. Did you ask — A. I don't know remember whether I seen it on the rap sheet or heard about it.

Q. All right. Well, whichever way you, it came to your attention, you didn't check to find out with the proper authorities as to what the disposition of that charge was, did you? A. I don't — I don't there had been a disposition at that time.

[675] Q. All right. A. I don't know.

Q. Is it that you don't know or you don't think it was disposed of at that time? A. I don't really know. I can't say.

Q. Did you check to see if Mr. Burns had an arrest warrant out for him? A. We — I run him through NCIC and there wasn't — didn't show no warrant, no.

Q. Now, Bryan County as a local agency, doesn't provide any training to the reserves, do you? A. Would you repeat that?

Q. Bryan County doesn't provide any training to the reserves, do they? A. Doesn't provide any?

Q. Yes, sir. A. Outside of them going to the C.L.E.E.T. school and on the-job training.

Q. All right. Sometimes that can be a tough place to learn the job, can't it? A. Well, it's about the way all of them learn it.

Q. All of them in Bryan County? A. Any other county.

Q. You authorized Stacy Burns to work as a reserve officer the night of May the 12th, 1991, didn't you? [676] A. He was there, yes.

Q. And you authorized Stacy Burns to make forcible arrests, necessary? A. I — he was not — he did not have authority to make arrests, no.

Q. He was not authorized by you to make forcible arrests? A. Not unless there was a deputy with him and the deputy told him to arrest someone or assist him in arresting.

Q. Did you ever tell Stacy Burns that? A. He knowed it.

Q. Did you ever tell him that? A. I'm sure I did.

Q. All right. Did you tell him that anybody was in charge of him? A. Did I tell him what?

Q. Did you ever tell him that somebody was in charge of him while he was out there working? A. Yes.

Q. What did you tell him? A. I told him whoever he was riding with would be in charge of him. He could not carry a gun.

He could not drive a car. He was just strictly there for — to observe and get what training he could.

MR. WALKER: May I approach the witness, Your Honor?

* * *

EXCERPTS OF TRANSCRIPT OF PROCEEDINGS — CALCLAZIER'S TESTIMONY

[Commencing at page 687]

16 years? A. Yes, sir.

Q. Would you tell me what your duties, if you can, briefly, what your duties have been over the years with respect to what you did as a reserve deputy? A. Assist officers, assist people. That was the reason I did it, was to protect and serve, help out where I could.

Q. Would your duties as an officer require you or not to be out in the county very often as distinguished from being in Durant? A. I spent a lot of time in the county.

Q. What were the purposes of your being out in the county? A. I did a lot of patrol work. To be seen. Mostly, to — if you are seen more, law enforcement are seen out in the county more, they are a lot apt, more apt to not having crime in that area when you have a lot of visible.

Q. All right. A. When you're highly visible.

Q. Now, there have been evidence offered in this trial, Mr. Calclazier, regarding some difficulties with the law that your grandson became involved in in Cleveland County, Oklahoma or Norman. Are you familiar with the problems that occurred at that time? A. Yes, sir.

Q. What part, if any, did you play in connection with that? [688] A. I helped to hire an attorney to go up there and see what could be done about getting everything straightened out.

Q. All right. Did you go to Norman, Oklahoma yourself? A. Yes, sir.

Q. And what did you do with respect to the complaints that had been filed against your grandson? A. I talked with the attorney and found that there had been several charges —

MR. WALKER: Your Honor, we're going to object. It calls for hearsay.

MR. JACK KENNEDY: We're not offering it for the truth of what is stated but the fact of what was stated.

THE COURT: Well, it will be admitted for showing what action he may have taken. The jury will not consider any statements made to the witness by the attorney for the truth of those statements but only for the purpose of showing what action the witness took.

MR. WALKER: Your Honor, if they're not being offered for the truth of the matter, I don't know what relevance they would have.

THE COURT: Well, come to the bench.

(An off the record side bar discussion was had between the Court, Counsel for the Plaintiff and Counsel for the Defendants out of the hearing and presence of the jury, after which the following occurred:)

[689] BY MR. JACK KENNEDY:

Q. Mr. Calclazier, after you got to Norman, what did you do with respect to your grandson? A. I went and talked to the attorney that had been hired.

Q. Okay. I don't want you to tell me what any of those people tell you, but I just want you to tell the jury what you did and what you said with respect to the charges that were there against your grandson. A. What I talked to the attorney, I asked — I requested him to go before the Judge and put all the charges together in one so we wouldn't have to keep coming back to Court on two or three different charges.

Q. You didn't want to come back and forth with him on various charges? A. Right.

Q. And I'll ask you on the date that this shows on January, I believe January the 4th, 1990, I believe it is, did your grandson plead guilty to all of those things at one time, at one hearing — A. Yes, sir.

Q. — in your presence? A. Yes, sir.

Q. All right. Now, Mr. Calclazier, has Mr. Burns always tried to hold down some type of a job during his educational training in the period of time since high school?

* * *

EXCERPTS OF TRANSCRIPT OF PROCEEDINGS — JURY INSTRUCTIONS

[Commencing at page 799]

* * *

I will now instruct you on the law applicable to Plaintiff's claim against Bryan County under Title 42, United States Code, Section 1983. If you have determined that Defendant Stacy Burns either arrested Plaintiff without probable cause or employed excessive force in arresting the Plaintiff, you will then need to consider whether Bryan County, Oklahoma may be liable to the Plaintiff under Section 1983.

Plaintiff's Claim under Section 1983 against the County is for inadequate hiring and training of Stacy Burns.

A county is liable for the deprivation of a constitutional right if the deprivation was pursuant to [800] governmental custom, policy, ordinance, regulation or decision.

Sheriff B.J. Moore is an official whose acts constitute final official policy of Bryan County, Oklahoma. Therefore, if you find that the Plaintiff was injured as the proximate or legal result of Bryan County's policy, custom, ordinance, regulation or as a result of a decision by Sheriff B.J. Moore, then Bryan County is liable.

In order to prove that a county hiring or training policy violated the Plaintiff's rights under Section 1983, the Plaintiff must prove by a preponderance of the evidence that:

One, the training or hiring policies of the county's policymaker, B.J. Moore, were inadequate.

Two, the County policymaker, B.J. Moore, was deliberately indifferent in adopting the hiring or training policy.

And three, the inadequate hiring or training policy directly caused the Plaintiff's injury.

Sheriff B.J. Moore would have acted with deliberate indifference in adopting an otherwise constitutional hiring policy for a deputy sheriff if the need for closer scrutiny of Stacy Burns' background was so obvious and the inadequacy of the scrutiny given so likely to result in violations of constitutional rights, that Sheriff B.J. [801] Moore can be reasonably said to have been deliberately indifferent to the constitutional needs of the Plaintiff.

Sheriff B.J. Moore would have acted with deliberate indifference in adopting an otherwise constitutional training policy if in light of the duties assigned to Deputy Sheriff Stacy Burns the need for more or different training was so obvious and the inadequacy so likely to result in violations of constitutional rights, that the Sheriff B.J. Moore can be reasonable said to have been deliberately indifferent to the constitutional needs of the Plaintiff.

I will now instruct you on the law applicable to Plaintiff's claim against Bryan County based on negligence. Plaintiff has also brought state law actions against Bryan County contending that Sheriff B.J. Moore was negligent in the hiring and training of Reserve Deputy Sheriff Stacy Burns.

In order to prove the essential elements of Plaintiff's claims, the Plaintiff must prove by a preponderance of the evidence each of the following:

One, that Sheriff B.J. Moore was negligent in the hiring and/or training of Stacy Burns.

Two, that Sheriff B.J. Moore's negligence was a proximate cause of some injury sustained by the Plaintiff.

Negligence means failure to use ordinary care; that

* * *

[810] * * *

THE COURT: Does the Plaintiff have any objections?

MR. WALKER: No objections, Your Honor.

THE COURT: The Defendant has some objections?

MR. JACK KENNEDY: Yes, Your Honor, we do.

THE COURT: I will first state before the Defendant begins for the record that all requested instructions by either party that were not substantially given in the Court's Charge are refused.

MR. JACK KENNEDY: We object to the Court's Charge for its failure to define what is meant by "custom" as required by *Minell* (spelled phonetically) and other cases. The evidence showing there was no established policy, therefore, a custom had to be also defined to the jury.

[811] We secondly object to the Charge for the failure of the Court to grant the Bryan County a good-faith defense in view, especially in view but not limited to that the County in all respects complied with the applicable state law.

We object to the instructions contained on Page 17 and 18 of the Charge relating to the policy for the reason that the Court has gone, has allowed the particular wrong of hiring Stacy Burns as

being the policy. In the instruction which the Court gave, the Court talks about a general policy but then all of a sudden it all relates to the individual actions of the sheriff with respect to the Stacy Burns.

All of the cases hold that the Plaintiff is required, and the Court is required to instruct that if there is a violation of policy, that policy has to be independent of the act as it is directed with respect to Stacy Burns.

The jury, in its issues Number 6 and 7, is allowed to consider by virtue of the instruction that all that the County had to do was improperly hire Stacy Burns or improperly train Stacy Burns, and that in and of itself is sufficient to establish a policy and/or custom. The law is quite clear, as a result of *Tuttle* and *Langerand* and *Kent vs. Harris* (spelled phonetically) that the specific deficiency of the policy must be established and the Charge, on Page 17 and 18, simply does not do that. The Charge talks about a governmental custom and policy and the general allegation at [812] the bottom of the page of the general rules relating to the custom or policy, but then the jury — the Court said that if the, without identifying what they do wrong, if they improperly hired or trained Stacy Burns, then that is a constitutional violation. I think the Court's instruction is totally improper for those reasons.

We further object to the Court's Charge for failing to require that the alleged improper training and hiring was the — strike that.

We object to the instruction because it did not require the Plaintiff to prove the specific deficiency in the training and hiring that would lead to the misconduct upon which the suit is based. We think that the law requires that the Court instruct the jury of the requisite causal connection between the injuries and

municipal policy by instructing the jury that they must show specific deficiencies in the training given police officers and not Stacy Burns individually, and that this deficiency led the misbehaving officer to engage in the alleged misconduct. And of course, the evidence does not have any showing that that occurred in this case.

Now, with respect to the excessive force, we ask the Court to instruct in accordance with the alternative charge contained in the pattern jury instructions with regard to excessive force, or at least if not the alternative, in [813] the original one because the uniqueness of this case would require that all of the matters involving good faith and qualified immunity appear in the Charge as provided as a result of *Johnson vs. Morell* (spelled phonetically) and other cases. And the Court has in its instructions taken away any reasonable and necessary good faith and that is the very issue in this case and has not followed the dictates of that pattern jury instruction.

In this connection, Judge, we would ask the Court to instruct the jury that unless you find that Bryan County sent out its officers on missions inadequately trained or there was a custom of using inexperienced trained officers on such missions, you will find for the County and against the Plaintiff on the 1983 issues.

We ask the Court — the Court failed to instruct, we ask the Court to instruct the jury that under 1983, an action will not lie for an arrest in violation of a state law, and before a person can be liable under 1983 or a county can be liable, he must have violated the federal constitution governing arrest.

We would further ask the Court to instruct in some manner the Court deems proper that there is no constitutional prohibition against an arrest for investigation where probably cause exists.

For there to be a probable cause to make an investigatory stop and an intrusion of the rights of [814] another, the officers must show a specific articulable fact in which taken together with rational inferences from those facts reasonably raise a suspicion warranting that intrusion. We think in this case, Your Honor, the actions require that some instruction be given to the jury as to the right of the officers under *Terry vs. Ohio and Others* (spelled phonetically) to make a pursuit to make an investigatory stop and to make an intrusion upon Jill Brown and Todd Brown during that investigatory stop. And a failure to do so I think is error.

We would object to the instruction regarding the negligence of the County and ask the Court to give instructions similar to this; that a County is not liable under Section 1983 for the negligence or gross negligence of its officers, including the sheriff or including Stacy Burns, or including the sheriff in failing to train Stacy Burns in the absence of evidence or at least a pattern of similar incidents in which citizens were injured or endangered intentionally or negligently by police misconduct and/or that serious incompetence or misbehavior was general or widespread throughout the sheriff's force.

We ask the Court to instruct the jury that flight from a scene on a checkpoint or roadblock could suggest probable cause to pursue and make an investigatory stop.

We further ask the Court to instruct the jury that [815] the — any alleged unconstitutional acts of Stacy Burns had to be, in order for the County to be held liable, it had to be the product of official government policy or the lack thereof.

We ask the Court to, in compliance with 220S196, I believe, of the Oklahoma statutes, to instruct that under the law of the State of Oklahoma, you're instructed that a police officer has a right to arrest a person without a warrant whenever that person

commits a public offense in his presence. Eluding the police and driving in excess of applicable speed limits are public offenses.

We further ask the Court to instruct the jury under 220S181 of the Oklahoma statutes that under the law of the State of Oklahoma, you're instructed that if an officer observes a motorist avoid a roadblock established by the officer, he is justified to stop that motorist and investigate.

And we object — I don't have the number of the instruction here — that the Court has stated regarding the law of the State of Texas. I'll make my objection that we object to the instruction that the law of the State of Texas prevent a peace officer from the State of Oklahoma to make an arrest or detain a person who has or is committing a crime in his presence. It is our belief that Article 14051 of the Texas statutes does not so hold, and thus the instruction is [816] erroneous and constitutes an improper statement of the law.

We ask the Court to instruct the jury that the law of the State of Oklahoma and in particular, 504(b), I believe, provide that if an operator of a motor vehicle willfully attempts to avoid a roadblock without receiving permission from a peace officer in attendance, he is guilty of a felony.

We would ask the Court to, in connection with — in addition to the good-faith instruction requested, that the evidence in this case showed that the County has complied in all respect with all state regulations and training and hiring and, therefore, it's to be considered in your deliberations as to whether or not the inadequate hiring or training of its officers constituted a municipal policy and/or custom.

We would ask the Court to instruct to the contrary of what it did. In this sense, we ask that you instruct the jury that if you

should find that the sheriff's deputy force in general was not inadequately trained or had the custom of using inexperienced trained officers, then you shall find that the County is not liable under 1983.

We would ask the Court to instruct the jury there is no constitutional prohibition against an arrest or investigation where probable cause exist. For there to be a probable — strike that. We've gone over that. I'm [817] repeating myself, Judge.

We would object Interrogatory Number 6 for the reason that it does not — first, for the reason that there's no evidence which holds, which supports the submission of the interrogatory for the reason that there is no showing that the hiring policy of the County was any different with respect to Stacy Burns and someone else, and the hiring policy inquired about has — asks the jury to consider only the case of Stacy Burns. Stated in a different way, the jury is asked whether B. J. Moore instituted a hiring policy with respect to Stacy Burns that was inadequate, et cetera. And the cases hold that that in and of itself is an improper inquiry.

Secondly, we object to the interrogatory because there is no evidence of a hiring policy in the case of Stacy Burns being the same policy that applied to the other officers, and that if he hired Stacy Burns differently than he hired other officers, then that should be so stated in the instruction and it would not be grounds for official misconduct of a customer policy.

THE COURT: Any more, Counsel?

MR. JACK KENNEDY: I have some more, Your Honor. I'm sorry I can't do better but I . . .

We object to Interrogatory Number 6 for the reason that

there has been no pleading to support the Interrogatory [818] Number 6. The interrogatory does not use the word "custom" as required by *Minell* and other cases. The used of the word "needs" rather than the word "rights" of the Plaintiff I think is improper. It allows the jury to consider the one hiring, one incident rather than a policy of hiring all of its officers, in direct violation of the case of the *Tuttle, Minell, Langerand, City of Kent vs. Harris, Rodriguez vs. Laveda* and others. It does not identify what action in the hiring of Stacy Burns was inappropriate or inefficient. It does not allow the good-faith defense in the interrogatory, and there's no evidence in the Charge of the institution of a policy by B. J. Moore.

With respect to Interrogatory Number 7, object to the use of Interrogatory Number 7 for the reason that there is no evidence to support that he had a separate training policy in the case of Stacy Burns or that the training policy of Bryan County was inappropriate, improper in any way. And thirdly, that a policy other than complying with 3311 and going to Cleat, could be inadequate and amount to deliberate indifference. Unless the interrogatory inquires of a general training policy specifically stated by the pleadings and evidence that the training of Stacy Burns was in keeping with the other — in keeping with his policy, then how he did as to this one officer is not an ultimate inquiry to go to the jury.

[819] The interrogatory comments that the sheriff has instituted a training policy with respect to Stacy Burns that was in keeping with the — apparently in keeping with the policy that had been going on forever during his tenure when there's no evidence to support, and certainly there's no evidence that it was inadequate, to amount to deliberate indifference.

We object to the interrogatory because it does not — is not based upon any instruction in the Charge that shows specific

deficiency which led to the misconduct. And there is no testimony that the training required of Stacy Burns had exhibited a pattern in the times previous to this incident which would lead the County to assume and believe that the incident caused by Stacy Burns was a result of inadequate training. This goes to the ultimate question without sufficient preliminary interrogatories asking about specific training or lack thereof.

We object to the statement at Page 8 of the Charge reading that Sheriff B. J. Moore, although not allowing Stacy Burns to carry a gun or operate patrol cars, he was allowed to physically seize citizens, restrain them, and place them under arrest when there is no pleading in the — or showing in the joint pre-trial order that that was a contention, and certainly there was no showing that that was a policy of the, or custom of the County which led to the incident in [820] question.

We object to the sentence on Page 11 reading as follows: On the other hand, under the law of Oklahoma under the law, an Oklahoma law enforcement officer has no right to pursue a citizen into Texas for a misdemeanor to make an arrest, for the reason that that is an incorrect statement of the law under 1983.

Under 1983, under *Terry vs. Ohio* and all the other cases, we think that the law is that a police officer has a right to pursue and make an investigatory stop and that this would in effect tell the jury that they crossing of the state line is a wrong and that Robert Morrison violated the law in doing so.

We object to the last sentence of Paragraph — on that last paragraph on that page reading: Furthermore, any person who willfully attempts to avoid a roadblock or checkpoint is guilty of a misdemeanor, for the reason, under 540(b) of the Statute of Oklahoma, he is guilty of a felony.

Generally, Your Honor, it is the contention of the Defendant that we feel that the Charge is generally insufficient in that does it does not require of the Plaintiff to plead and prove that there was a particular deficiency in the training and hiring policy of the County which has been established in the evidence, and that we ask for such instructions under Rule 51, that would require the [821] Court to instruct and submit interrogatories finding that the, or showing that one incident of police misconduct or one incident of violation of hiring and training policy cannot in and of itself constitute a policy and cannot grant the right to consider liability on the County in behalf of the Plaintiff.

Finally, on behalf of Stacy Burns, additionally, we ask the Court to find as a matter of law that Stacy Burns had qualified immunity. Secondly, that as a matter of law under the Oklahoma Tort Claims Act, if he was acting in his capacity as a reserve deputy, there cannot be any liability upon him for negligent acts taken in the line of duty.

THE COURT: Anything further?

MR. JACK KENNEDY: Nothing further, Your Honor.

THE COURT: The Defendants objections are overruled.

The jury will be instructed to begin their deliberations, and the Court will be in recess awaiting a verdict.

(Recess from 12:43 p.m. to 4:25 p.m.)

THE COURT: We have received the following notes from the jury: Please explain in laymen's terms the Doctrine of Qualified Immunity.

Two, does Interrogatory Number 2 pertain directly to Stacy Burns.

[822] The Court would propose to answer these two questions as follows: In answer to Question Number 1, I refer to the instructions previously given by the Court.

In answer to Question Number 2, I would answer it, the answer is "yes."

Does the Plaintiff have any objections or suggestions for answering the questions differently?

MR. WALKER: We have no objection, Your Honor.

MR. JACK KENNEDY: No objections.

THE COURT: All right. That's the way it will be answered then.

(Recess from 4:27 p.m. to 4:45 p.m.)

THE COURT: Be seated.

Bring the jury in.

(Jury entered the courtroom at 4:46 p.m.)

THE COURT: You may be seated.

Ms. Reeder, do you speak for the jury?

FOREPERSON REEDER: Yes, sir, I do.

THE COURT: And has the jury reached a verdict?

FOREPERSON REEDER: Yes, sir, we have.

THE COURT: Is it a unaminimous verdict?

FOREPERSON REEDER: Yes, sir, it is.

THE COURT: You may pass it to the security officer.

THE COURT: Members of the jury, I'm going to have [823] your verdict published now by having the Clerk read it. Pay close attention because after it has been read, I will poll you to be certain that that is the verdict of each one of you.

The Clerk will now read the verdict.

4:91cv229. Jill Brown vs. Stacy Burns and Bryan County, Oklahoma. Verdict of the jury:

Interrogatory Number 1: Do you find from a preponderence of the evidence that Stacy Burns arrested Jill Brown without probable cause on May 12th, 1991? Answer: We do.

Interrogatory Number 2: Do you find from a preponderance of the evidence that Plaintiff's claim for false arrest is barred under the Doctrine of Qualified Immunity as instructed by the Court? We do not.

Interrogatory Number 3: Do you find from a preponderance of the evidence that Stacy Burns employed excessive force upon the Plaintiff on May 12th, 1991? Answer: We do.

Interrogatory Number 4: Do you find from a preponderance of the evidence that Plaintiff's claim for excessive force against the Defendant Stacy Burns is barred under the Doctrine of Qualified Immunity as instructed by the Court? Answer: We do not.

Interrogatory Number 5: Do you find from a [824] preponderance of the evidence that Defendant Stacy Burns is liable to the Plaintiff for false imprisonment? Answer: We do.

Interrogatory Number 6: Do you find from a preponderance of the evidence that the hiring policy of Bryan County in the case of Stacy Burns as instituted by its policymaker, B.J. Moore, was so inadequate as to amount to deliberate indifference to the constitutional needs of the Plaintiff? Answer: We do.

Interrogatory Number 7: Do you find from a preponderance of the evidence that the training policy of Bryan County in the case of Stacy Burns as instituted by its policymaker, B.J. Moore, was so inadequate as to amount to deliberate indifference to the constitutional needs of the Plaintiff? Answer: We do.

Interrogatory Number 8: Do you find from a preponderance of the evidence that Bryan County, acting through Sheriff B.J. Moore, was negligent in the hiring of Reserve Deputy Sheriff Stacy Burns? Answer: We do.

Interrogation Number 9: Do you find from a preponderance of the evidence that Bryan County, acting through Sheriff B.J. Moore, was negligent in the training of Reserve Deputy Sheriff Stacy Burns? Answer: We do.

Interrogatory Number 10: What sum of money, if any, do you find from a preponderance of the evidence would [825] fairly and reasonably compensate the Plaintiff for any damages proximately caused by the Defendant Stacy Burns or the Defendant Bryan County, acting through its policymaker, Sheriff B.J. Moore? Answer: Past physical pain, $5,000. Future physical pain, $10,000. Past mental pain and anguish,

$1,000. Future mental pain and anguish, $1,000. Past physical impairment, $75,000. Future physical impairment, $360,000. Past disfigurement, $1,000. Future disfigurement, $2,000. Loss of income in the past, $36,000. Loss of earning capacity in the future, $180,000. Deprivation of constitutional right not to be subjected to excessive force, $50,000. Deprivation of constitutional right for loss of liberty, $50,000. Damage to reputation, five hundred. Past medical expenses, $65,802. Future medical expenses, $90,000.

Interrogatory Number 11: What is a reasonable fee for the necessary services of Plaintiff's attorneys in this case stated in dollars and cents? For preparation and trial, $65,000. For an appeal to the Court of Appeals, 12,500. For making and responding to an application for Writ of Certiorari to the United States Supreme Court, 5,000. If application of writ is granted by the Supreme Court of the United States, 5,000.

Interrogatory Number 12: What sum of money, if any, do you find in your discretion should be assessed against the Defendant Stacy Burns as exemplary or punitive [826] damages for the constitutional violation suffered by the Plaintiff? Answer: $20,000. Date 4/19/93, Debbie Reeder, Foreperson.

THE COURT: Ms. Reeder, is that your verdict?

FOREPERSON REEDER: Yes, sir, it is.

THE COURT: Mr. Fullington, is that your verdict?

JUROR FULLINGTON: Yes, it is, Your Honor.

THE COURT: Mr. Andrews, is that your verdict?

JUROR ANDREWS: Yes, it is, Your Honor.

THE COURT: Mr. Richards, is that your verdict?

JUROR RICHARDS: Yes, it is, Your Honor.

THE COURT: Ms. Russell, is that your verdict?

JUROR RUSSELL: Yes, it is, Your Honor.

THE COURT: Mr. Lagos, is that your verdict?

JUROR LAGOS: Yes, Your Honor.

THE COURT: Ms. Irwin, is that your verdict?

JUROR IRWIN: Yes, it is, Your Honor.

THE COURT: Mr. Barnes, is that your verdict?

JUROR BARNES: Yes, Your Honor.

THE COURT: All right. The verdict, then, will be filed.

I thank you, ladies and gentlemen of the jury, for your long and diligent service as jurors in this case. Our judicial system could not function without the function of jurors. They're indispensable. And so you have, indeed, [827] rendered a valuable service to your system.

I remind you that under the rules of this Court you do not have to discuss your service as jurors in this case with anyone unless ordered to do so by the Court. And furthermore, the attorneys in the case are not to contact you about your service in this case unless — without first obtaining the permission of the Court.

Again, I thank you. And you may now pass from the courtroom.

(The jury left the courtroom at 5:55 p.m.)

THE COURT: If there is nothing further at this time, the Court is adjourned.

MR. JACK KENNEDY: Your Honor, when can I make my objection that —

THE COURT: I will advise the report that I had indicated earlier in the day in the absence of the court reporter that I would — this was before the case was submitted to the jury, that I would permit Mr. Kennedy to make an objection, an additional objection to the Charge and consider that it was timely made.

You may now do that, Mr. Kennedy. And the remainder of you may be seated.

MR. JACK KENNEDY: Your Honor, the Defendant further objects to the failure of the Court to submit an issue inquiring or allowing the jury to proportion the [828] issues, the amount of negligence between Stacy Burns and Jill Brown. Since the disputed testimony was raised to the action of Jill Brown which may be believed by the jury in bringing about the action of Stacy Burns, that, therefore, under the law of the State of Texas, the comparative negligence of the parties should have been submitted — should be submitted to the jury in order that the jury would have an opportunity to find, if they wanted, that Jill Brown's negligence was involved and should be compared with that of the Plaintiff.

Further, that since the matter of the joint enterprise was tried with consent, that the negligence of Ms. Brown should be

considered in light of the actions of her husband, Rodney Todd Brown.

We would ask that the Court submits an issue similar to that of the 5th Circuit Pattern Jury Instruction, Civil Law Number 1(a), or issues similar to that.

THE COURT: As I advised Counsel at the time that the request was made and as I now state for the record, the request is denied.

The Court is adjourned.

(Proceedings adjourned at 5:57 p.m.)

I certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter.

s/ illegible
COURT REPORTER

6-25-93
DATE

No. 95-1100 (9)

In The

Supreme Court of the United States

October Term, 1995

THE BOARD OF THE COUNTY COMMISSIONERS OF BRYAN COUNTY, OKLAHOMA,

Petitioner,

vs.

JILL BROWN, *et al.*,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF FOR PETITIONER

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40 pp

QUESTIONS PRESENTED

1. Does the United States Constitution impose liability on a County for a single hiring decision that comports with state law in every respect, when there is no evidence that the County's hiring practice in the past has resulted in the deprivation of a citizen's constitutional rights?

2. Does the hiring of a Reserve Deputy who has one misdemeanor conviction for assault and battery and traffic violations establish a causative link (amounting to deliberate indifference) between the decision to hire him and his subsequent use of force during the course of an arrest?

3. Are federalism concerns implicated by an opinion which imposes liability on a County for hiring a deputy with one misdemeanor assault and battery conviction and other minor offenses, when the State of Oklahoma proscribes only the hiring of individuals with felony records?

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TABLE OF CITATIONS

Cases Cited:

OPINIONS AND JUDGMENT BELOW

The opinion of the court of appeals (App. 3a) is reported at 67 F.3d 1174. A superseded opinion of the court of appeals is reported at 53 F.3d 1410. The opinion of the district court (App. 30a) is unreported.

STATEMENT OF JURISDICTION

The judgment of the court of appeals was entered on October 23, 1995. Petitioner's Petition for Rehearing of Substituted Opinion and Petitioner's Suggestion for *En Banc* Consideration were denied by written order on November 29, 1995. (App. 1a). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourth Amendment of the United States Constitution provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

42 U.S.C. § 1983 provides, in relevant part:

> . . . Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District

> of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

Oklahoma Statute Title 70, § 3311 (West 1994) provides:

> No person shall be certified as a police or peace officer in this state unless the employing agency has reported to the Council that:
>
> a. the Oklahoma State Bureau of Investigation and the Federal Bureau of Investigation have reported that such person has no record of a conviction of a felony or crime involving moral turpitude,
>
> b. such person has undergone psychological evaluation. . . . The psychological instrument utilized shall be evaluated by a psychologist licensed by the State of Oklahoma, and the employing agency shall certify to the Council that the evaluation was conducted in accordance with this provision and that the employee/ applicant is suitable to serve as a peace officer in the State of Oklahoma. . . .

> This section shall also be applicable to all reserve peace officers in the State of Oklahoma, and
>
> c. such person possesses a high school diploma or a GED equivalency certificate. . . .

STATEMENT OF THE CASE

A. Facts of the Case

1. Stacy Burns' Background.

Stacy Burns graduated from high school in Durant, Oklahoma in May, 1988, approximately one month after his 18th birthday. (J.A. 85a).[1] For the next several months, Burns worked at Collier Brothers Furniture and Home Furniture Company and attended a college course at Southeastern State University. (J.A. 86a, 87a). By the beginning of 1989, Burns had enrolled full-time at the Norman, Oklahoma campus of the University of Oklahoma, in Clayton County. (J.A. 87a).

In September of 1989, while Burns was driving across the university campus, he came upon a fraternity pledge class. (J.A. 89a-90a). One of the members of the pledge class hit Burns' car. Burns stopped his car, got out, and confronted the students, several of whom began pushing Burns. He responded in kind. (J.A. 90a). There are no other details in the record regarding this fraternity fracas. The record does suggest, however, that police officers were called to the scene. (J.A. 43a, 81a, 100a). The record does not reveal whether members of the pledge class were charged with any criminal offense.

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1. Appendix to the Petition for Writ of Certiorari will be designated as (App. __). "J.A." refers to the Joint Appendix. References to the trial transcript will be designated as (Tr. __).

As a result of this encounter, Burns pleaded guilty to a number of misdemeanors, including assault and battery, public drunkenness, and possession of a false identification. (J.A. 41a-43a, 90a, 121a). Although he also pleaded guilty to several traffic offenses, it is unclear whether they were related to the campus incident or were the result of previous infractions. (J.A. 80a-83a, 88a-90a).

2. Bryan County's Hiring and Training of Stacy Burns.

In May, 1991, Burns formally applied for a Reserve Deputy position with Bryan County, Oklahoma. (J.A. 45a-46a). Burns' background did not disqualify him from law-enforcement employment,[2] therefore, the decision to hire him was left to the discretion of B.J. Moore, Bryan County's Sheriff. Moore had passing familiarity with Burns, who is the son of Moore's nephew. (J.A. 110a). Moore knew, for example, that Burns had received several traffic tickets and that Burns had been arrested for being in actual physical control of a motor vehicle while intoxicated. (J.A. 114a). Although he had obtained a copy of Burns' driving record and a report from the National Crime Information Center ("NCIC"), Moore did not know that Burns had pleaded guilty to assault and battery or public drunkenness. (J.A. 115a).

In accordance with state law, Burns enrolled in the Council on Law Enforcement Education and Training ("CLEET") program and began receiving instruction there on May 6, 1991. (J.A. 74a). In addition to this training, Burns rode with certified Peace Officer Earl Howell and Special Deputy Joe Calclazier as

2. Indeed, Otto Schweizer, Brown's expert witness on hiring standards, agreed that Bryan County complied with Oklahoma State statutes governing the hiring of Stacy Burns. (J.A. 47a-48a, 50a).

they carried out police business. (Tr. 579).[3] Calclazier and Howell gave Burns general instructions on law enforcement and particular instruction on how to detect drunk drivers, on proper procedures to conduct an investigatory stop, and on methods of placing a suspect under the officer's custody and control. (Tr. 580). In addition, Burns learned radio dispatch signals employed by the Bryan County dispatcher and studied law enforcement techniques provided by the Law Enforcement Training Network ("LETN"), a closed-circuit television program used as an instructional tool for law enforcement officers. (Tr. 579).

Sheriff Moore prohibited Burns from driving a vehicle or from carrying a revolver. (J.A. 95a, 117a-118a). In addition, Burns was not authorized to make forcible arrests unless he was accompanied by a supervising deputy. (J.A. 117a).

3. Todd Brown's Evasion of the Police Checkpoint: Deputy Sheriff Morrison and Reserve Deputy Burns' Pursuit of the Vehicle.

In the early morning hours of May 12, 1991, Todd Brown and his wife, Jill Brown, were traveling in her 1979 Chevrolet pickup truck from Grayson County, Texas to their home in Bryan County, Oklahoma. (Tr. 131). At 1:30 a.m., they crossed the Denison dam and entered Oklahoma, just north of the Texas-Oklahoma border. (Tr. 589). When Todd Brown saw he was approaching a police checkpoint near the high-crime area of Cartwright, Oklahoma, he abruptly reversed direction and headed south across the Denison dam back into Texas. (J.A. 111a). (Tr. 433, 590, 692). Although Todd Brown stated that he avoided the checkpoint because he had been "harassed" by police in the past, the record suggests he may have been worried

3. Schweizer agreed that the State of Oklahoma permits sheriff departments to allow reserve deputy sheriffs to accompany certified peace officers as they carry out law-enforcement duties. (J.A. 55a-56a).

that the police would discover the loaded rifle in the cab of the truck or the revolver concealed in a pocket of Jill Brown's front seat. (Tr. 48-49, 101, 134, 449).

Deputy Sheriffs Robert Morrison and Joe Calclazier and Reserve Deputy Stacy Burns were manning the police checkpoint when they observed Brown's vehicle make a U-turn and travel in the opposite direction. (Tr. 433, 590, 692). According to the officers, the Browns' truck fishtailed, its tires squealing, and left the checkpoint at a high rate of speed toward the Denison dam. (Tr. 433, 589-90, 692, 697). Todd Brown's testimony on the subject was purely subjective: he "didn't believe" his tires squealed; they "weren't intended to." (Tr. 135). He "didn't think" his pickup fishtailed, although he acknowledged that his front tires "kind of slide around some." (Tr. 136). With respect to the speed of his turn, he surmised that it "would be normal I would suppose." Did he leave at a high rate of speed? "I wouldn't have thought so. Pretty much just normal." (Tr. 135-36).

The contrary evidence — and the only evidence that explains the officers' pursuit and the participation of the Texas Highway Patrol — was direct, descriptive and definite. (Tr. 433, 589-90, 692, 697). There was direct evidence that Officer Morrison could not have caught the Browns without achieving speeds in excess of 100 miles per hour. (Tr. 435). Uncontradicted evidence established that Morrison and Burns informed the Bryan County dispatcher of their pursuit. (Tr. 442, 593). The record also establishes that Todd Brown proceeded nearly three-quarters of a mile after he first observed the pursuing patrol car's emergency lights. (Tr. 45, 141-42). The pursuit finally ended in Grayson County, Texas, approximately 4 miles south of the police checkpoint. (Tr. 45, 436-37, 610).

After Officer Morrison finally forced the Brown vehicle to

stop, Morrison and Burns placed their lives on the line. They emerged from their vehicle and ordered the occupants to get out of the truck. (Tr. 49, 441). Although Brown concedes that Officer Morrison may have ordered her to get out of the vehicle, she excuses any disobedience by claiming that, if Officer Morrison made such a command, she "didn't hear it." (Tr. 106).[4] Burns came around to the passenger door and ordered Brown to get out. (Tr. 625). At trial (if not on appeal) Brown conceded that she leaned forward, hands outstretched, when instructed by Burns to exit the truck. (Tr. 54, 595, 597, 627, 714).

Brown's forward lean, which occurred after the deputies had chased the truck four miles down a lonely road in the dead of night and after Jill Brown had twice refused to comply with direct orders, caused Reserve Deputy Burns to react with what all experts described as the "lowest level of force" an officer can employ short of purely oral persuasion. (Tr. 391-921, 505-06, 509-10). Burns seized Brown's arm at the wrist and elbow, extracted her from the vehicle, and placed her on the ground. (Tr. 595-97, 627). After a scuffle, Officer Morrison was finally able to place handcuffs on Todd Brown. (Tr. 442-43). The officers removed the loaded rifle and the concealed revolver from the truck after they had secured its occupants. (Tr. 48-49, 101, 449).

Jill Brown testified that she attempted to obey Burns' commands. She testified that, although she leaned forward, her hands outstretched, she was not "reaching" for anything at the time she was extracted from the vehicle. (Tr. 52, 54). As a result of the incident, Brown claims she suffered serious and disabling injuries to her knees. (Tr. 52-54, 261, 267-68).

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4. Todd Brown heard one of the officers say "Get out and put your hands on the hood." (Tr. 185). Officer Morrison testified that he ordered the occupants to get out of the truck. (Tr. 442-43). Stacy Burns testified that he ordered Jill Brown to get out of the truck. (Tr. 625).

B. Course and Disposition of Proceedings Below

Jill Brown commenced this suit under 42 U.S.C. § 1983 alleging that Bryan County, Oklahoma, Stacy Burns, Robert Morrison, and B.J. Moore were guilty of violating her constitutional rights. Brown alleged that Stacy Burns' actions in forcibly removing her from the pickup truck and handcuffing her during the investigatory stop amounted to excessive force that deprived her of rights under the Fourth, Fifth, Eighth and Fourteenth Amendments to the United States Constitution. Plaintiff's Third Amended Complaint. (R. 648).

Brown alleged that Bryan County violated the Constitution either by: (1) hiring Burns, or (2) failing to adequately train Burns. The district court granted summary judgment in favor of Moore and Morrison, but denied Burns' and the County's motion for summary judgment. (J.A. 19a-29a). The case was tried to a jury. Bryan County moved for judgment as a matter of law at the close of Brown's case and renewed its motion at the close of all of the evidence. (J.A. 58a) (App. 30a). Both motions were denied. (J.A. 70a) (App. 35a). In addition to numerous other grounds, Bryan County objected to the court's charge on the basis that the evidence conclusively established compliance with applicable state law with regard to the hiring of Stacy Burns, that there can be no county liability under section 1983 for one isolated hiring decision, and that the jury interrogatories, which assumed Bryan County had adopted a "policy" of hiring Burns, was erroneous. (J.A. 128a-132a). Those objections were denied. (J.A. 132a).

The jury found that Stacy Burns arrested Jill Brown without probable cause; that Stacy Burns employed excessive force; that Stacy Burns falsely imprisoned Brown; and that Stacy Burns was not entitled to the defense of qualified immunity. (App. 38a-40a).

The jury also answered interrogatories concerning Bryan County. (App. 40a-41a). With respect to liability under section 1983, the jury found as follows:

> 1. . . . that the hiring policy of Bryan County ***in the case of Stacy Burns*** was so inadequate as to amount to deliberate indifference to the constitutional needs of the plaintiff;
>
> 2. . . . that the training policy of Bryan County ***in the case of Stacy Burns*** was so inadequate as to amount to deliberate indifference to the constitutional needs of the plaintiff.

(Emphasis added).

The jury assessed a total of $765,300 in actual damages; $87,500 in attorneys fees; and $20,000 in exemplary damages, for a total award of $872,500. (App. 41a-44a). Finding no evidence of loss of income in the past or loss of earning capacity in the future, the court rendered judgment against Brown for those amounts. (App. 34a). The district court entered judgment against Burns and the County for the $711,302 in actual damages; $87,500 in attorneys fees; and $20,000 in punitive damages. (App. 36a-37a). The district court did not award Brown any recovery against defendants Morrison and Moore. Burns and the County appealed the judgment. (R. 981).

There are two reported Fifth Circuit opinions. In the first opinion, which was superseded by the second, the court found "no evidence that Sheriff Moore did anything less than that which is required by [state] law" and concluded that "we do not find the training practices inadequate." *Brown v. Bryan County,*

OK, 53 F.3d 1410, 1425 (5th Cir. 1995). The court observed that Brown's failure to adduce evidence of other similar incidents or widespread misbehavior in the force precluded recovery under the inadequate training claim. *Id.* Nevertheless, the court found sufficient evidence to support what it variously termed Brown's "negligent-hiring," "inadequate screening" or "wrongful hiring" claim. According to the court, a section 1983 plaintiff need not prove similar incidents in order to recover against a county for its decision to hire an individual whose character is "deficient." *Id.* at 1421-1425.

On rehearing, the Fifth Circuit expunged its analysis of the "inadequate training" claim and affirmed the judgment solely on the basis that the county's "inadequate screening" of Reserve Deputy Burns was deliberately indifferent to the public's welfare and the direct cause of Brown's injuries. *Brown v. Bryan County, OK*, 67 F.3d 1174, 1185 (5th Cir. 1995). In its opinion, the Fifth Circuit acknowledged: "[i]t is certainly true that the Sheriff had conducted adequate background checks on other deputies and assured himself that they were certified before putting them on the street . . ." *Id.* at 1185 n. 22. The court also agreed that the law of the State of Oklahoma did not disqualify Stacy Burns from serving as a reserve deputy. *Id.* at 1184 n. 20. Nevertheless, the court wrote that Burns' background evidenced a "deficient character," a "propensity for violence," and a "disregard for the law," all of which precluded his employment. *Id.* The Fifth Circuit concluded that the County's "single action of hiring Burns without an adequate review of his background directly caused the constitutional violations of which Mrs. Brown now complains." *Id.* at 1185.

Judge Emilio Garza dissented from the majority's opinion and judgment with respect to Bryan County. In Judge Emilio Garza's view, "*one* inadequate background investigation, even by a municipal policymaker, is not the 'unconstitutional

municipal policy' of which *Monell, Pembaur,* or *Tuttle* speaks." *Id.* at 1185 (internal citations omitted). Judge Emilio Garza articulated the basis for his dissent as follows:

> I do not agree, therefore, with the majority's implicit reasoning [explicitly stated in *Gonzalez v. Ysleta Indep. Sch. Dist.*, 996 F.2d 745 (5th Cir. 1993)] that any "distinction between policies that are themselves unconstitutional and those that cause constitutional violations" is "metaphysical." . . . The majority incorrectly, in my opinion, follows our opinion in *Gonzalez* in holding that Sheriff Moore's single decision created municipal liability, without reconciling the Supreme Court's instruction in *Tuttle* that a jury must have "considerably more proof than the single incident" before it can find causation. . . .
>
> * * *
>
> I do not believe that the Court in *Pembaur* intended to suggest that *any* and *every* act by a final municipal policymaker constitutes, without more, "municipal policy." Sheriff Moore's deliberate indifference may have caused the constitutional violation in a "but for" sense, but it did not directly "order" or "authorize" the violation. Where the policymaker's decision does *not* directly "order" or "authorize" the constitutional violation, something more than a single decision is required in order to find that this decision in fact constitutes "municipal

> policy," such that we can hold the county liable. . . .

Judge Emilio Garza would have reversed the judgment as to Bryan County. *Id.* at 1186-87.

SUMMARY OF THE ARGUMENT

I. The Fifth Circuit's Opinion Contravenes *Monell.*

Of the numerous opinions issued by this Court since the landmark decision of *Monell v. Dept. of Social Services of the City of New York*, 436 U.S. 658 (1978), not one has questioned the fundamental tenet, borne of both statutory construction and adherence to principles of federalism, that section 1983 does not subject municipalities to *respondeat superior* liability for torts committed by their employees. If there is to be municipal liability under that section, it must occur one of two ways: (1) when the municipality is aware of, yet remains consciously indifferent to, a *pattern* of constitutional violations arising from the municipality's customary practices; or (2) when the municipality itself adopts a policy which either:

> a. directly causes the deprivation of a citizen's constitutional rights by *ordering* subordinates to violate the constitution, *see Pembaur*, 475 U.S. at 484; or
>
> b. inevitably causes the deprivation of constitutional rights, because it is clear to a moral certainty that execution of the policy will have that result. *Canton*, 489 U.S. at 390 n. 10.

Neither circumstance was raised by the evidence in this case.

First, Respondent has conceded the absence of any *pattern* of constitutional violations. Indeed, the record is clear that Jill Brown's claim is the *only* claim made against the Bryan County Sheriff's Department alleging *any* kind of police misconduct. The record is plain that "Sheriff Moore had conducted adequate background checks on other deputies and assured himself that they were certified before putting them on the street . . ." *Brown v. Bryan County, OK*, 67 F.3d at 1185.

Second, it is obvious that Bryan County did not *order* Stacy Burns to violate Jill Brown's constitutional rights. Therefore, Brown's claim of municipal liability rests on the premise that Bryan County adopted a *policy* which officially sanctioned hiring a person it knew, to a moral certainty, would deprive citizens of rights guaranteed by the United States Constitution. That premise is indefensible.

No one has ever questioned that Bryan County's hiring policy — whether with respect to Stacy Burns or any other peace officer or reserve deputy — conformed with the State of Oklahoma's minimum standards for employment. The state's statute prohibits hiring individuals with felony convictions, but there is no prohibition with regard to misdemeanors. (J.A. 47a-48a, 50a, 72a). In addition, there was no evidence whatsoever that hiring individuals with misdemeanor records resulted in the deprivation of *any* citizens' constitutional rights. It is not *per se unconstitutional* to hire such persons, because there is neither psychiatric nor anecdotal evidence that hiring an individual with *one* misdemeanor conviction for assault and battery would inevitably result in that individual's trampling on constitutional rights while employed as a reserve deputy.

In the absence of notice that compliance with the state's minimum hiring standards inevitably results in its employees' violation of constitutional rights, there is no showing of a

constitutionally-prohibited "policy" and thus no basis for recovery under section 1983. The lower court's relaxation of Respondent's burden, on the ground that such a hiring choice "cannot be tolerated," is tantamount to driving a stake into the heart of *Monell* by applying the doctrine of *respondeat superior* in the context of section 1983 claims against municipalities.

The lower court's opinion should therefore be reversed because it clearly rests on *respondeat superior* liability, in direct contravention of *Monell*.

II. Principles of Federalism Limit Municipal Liability for Singular Hiring Decision Which Comports With Constitutionally-Valid State Law.

"The issue in the present case concerns directly a basic problem of American federalism: the relation of the Nation to the States in the critically important sphere of municipal law administration. In this aspect, it has significance approximating constitutional dimension." *Monroe v. Pape*, 365 U.S. 167, 222 (1961) (Frankfurter, J., dissenting in part). No less than *Monroe*, this case turns on a distribution of power, pitting a state's authority to determine the eligibility of candidates for public employment, against the federal government's power to veto that determination, even when the determination itself does not offend any constitutional provision.

There is no State law precluding Bryan County from employing Stacy Burns; indeed, the State of Oklahoma vests in its counties the discretion to hire individuals who have had minor skirmishes with the law. Okla. Stat. Ann. Tit. 70, § 3311(D)(2) (West 1994). Where the hiring decision is not itself unconstitutional and no federal law governs the hiring decision,

concepts of federalism dictate that the State of Oklahoma's qualifying standards for police service should control. *See Rizzo v. Goode*, 423 U.S. 362, 378-380 (1976). In the absence of a pattern of constitutional deprivations arising from the adoption of a particular hiring standard, there is no constitutional basis for holding a County liable for personnel choices that conform to State requirements and which, in and of themselves, do not violate any constitutional provision or federal statute.

In this case, the Fifth Circuit crafted a minimum hiring standard — apparent nowhere in the United States Constitution — which a County cannot disturb without subjecting itself to liability under section 1983. The court's substitution of a federal hiring standard for Oklahoma's, without articulating any reasoned basis for such, will "engage the federal courts in an endless exercise of second-guessing municipal [hiring] programs" which, as this Court has recognized, "implicate[s] serious questions of federalism." *Canton v. Harris*, 489 U.S. 378, 392 (1989).

ARGUMENT

I.

THERE IS NO MUNICIPAL LIABILITY FOR A COUNTY'S HIRING DECISION, WHICH COMPORTS WITH VALID STATE LAW, WITHOUT EVIDENCE OF SIMILAR INCIDENTS OR AN AFFIRMATIVE LINK BETWEEN THE HIRING AND THE CONSTITUTIONAL DEPRIVATION.

It is well-settled that a municipality[5] may not be held liable under section 1983 solely because it employs an individual later

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5. Petitioner employs the term "municipality" as synonymous with the term "county."

found to have deprived a citizen of rights secured by the United States Constitution. *Monell v. Dept. of Social Services of New York*, 436 U.S. 658, 691 (1978). Only when a municipality's execution of a policy or custom inflicts a constitutional injury may the government as an entity be held responsible under section 1983. *Id.*

Respondent has conceded (as she must) the absence of any evidence of an offending "custom." Respondent's Brief in Opposition at 20. As for "policy," the record establishes conclusively that Bryan County's hiring conformed with the State of Oklahoma's overriding policy, defined by statute, regarding the employment of reserve deputies and peace officers. Okla. Stat. Ann. Tit. 70, § 3311(d)(2)(a) (West 1994). (J.A. 47a-48a, 50a, 112a). The state's policy, which no one has suggested offends the Constitution, has not been shown to give rise to a systematic deprivation of rights. Thus, the Fifth Circuit's holding imposes liability on Bryan County solely because it hired Stacy Burns.

1. Respondent Has Conceded Absence of "Custom" of Inadequate Hiring.

A municipal "custom" presupposes a "persistent and widespread practice" that has become "so permanent and well-settled as to constitute a "custom or usage with the force of law." *Monell*, 436 U.S. at 690, *quoting Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 167 (1970). A municipality thus becomes accountable for acquiescing in a "custom" only when it knowingly tolerates a pattern or practice of unconstitutional conduct. Evidence that one employee on one occasion violated one individual's constitutional rights does not constitute custom.

In the present case, the only "pattern" is of compliance with the law governing employment of law enforcement personnel. With the exception of the present case, the County had not received complaints alleging that an officer or reserve deputy

was abusive to, or utilized excessive force on, any citizen. (J.A. 112a). In fact, there had never been any complaint against the Bryan County Sheriff's department during Sheriff Moore's tenure. *Id.* With the sole exception of Respondent's complaints, Stacy Burns had never been accused of using excessive force. (Tr. 581). Under these circumstances, it is not surprising that Respondent would concede she has no evidence of an offensive custom. Respondent's Brief in Opposition at 20.

2. There Is No Evidence that Bryan County Adopted a "Policy" of Inadequate Screening.

A municipal "policy" is a "statement, ordinance, regulation, or decision officially adopted and promulgated by [the municipality's] officers." *Monell*, 436 U.S. at 690. This Court has observed that a deliberate single act by a nonpolicymaker does not constitute a policy sufficient to create municipal liability. *Oklahoma City v. Tuttle*, 471 U.S. 808, 824 (1985). Moreover, one may not infer a policy of inadequate police training based on evidence of a "single incident" of police misconduct. *Id.* As Justice Brennan noted in his concurring opinion in *Tuttle*: "[t]o infer the existence of a city policy from the isolated misconduct of a single, low-level officer, and then to hold the city liable on the basis of that policy, would amount to permitting precisely the theory of strict *respondeat superior* liability rejected in *Monell*." 471 U.S. 808, 831 (1985). As a result of these concerns, the definition of "policymaker" is limited to those persons authorized to create *final* "municipal policy."

This Court initially examined the nature of a final policymaker in *Pembaur v. City of Cincinnati*, 475 U.S. 469 (1986).[6] In the context of a policymaker's single

6. In *Pembaur*, a County Prosecutor directed County Sheriffs to enter a (Cont'd)

unconstitutional act, Justice Brennan, writing for the plurality, observed that under appropriate conditions, official policy *may* be created when an authorized decisionmaker embarks upon a "course of action tailored to a particular situation and not intended to control decisions in later situations." *Id.* at 481; *see Owen v. City of Independence*, 445 U.S. 622 (1980) (city council's discharge of employee without pretermination hearing); *City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247 (1981) (city council's cancellation of concert license based on content of performance). The official with this final authority is one who not only has "discretion in the exercise of particular functions" but "must also be responsible for establishing *final* government policy respecting such activity before the municipality can be held liable." *Pembaur, supra* at 482-83; *see also Bennett v. Slidell*, 728 F.2d 762, 769 (5th Cir. 1984) (en banc), *cert. denied*, 472 U.S. 1016 (1985) (policymaking authority is more than having the final say-so, as a matter of practice).

Justice Brennan stressed that "[m]unicipal liability attaches only where the decisionmaker possesses *final* authority to establish municipal policy with respect to the action ordered. The fact that a particular official — even a policymaking official — has discretion in the exercise of particular functions does not, without more, give rise to municipal liability based on an exercise of that discretion." *Pembaur, supra* at 481-82 (emphasis added). It is clear from the opinion, however, that a "policymaker" may have final discretion within his sphere of operation, yet remain incapable of establishing final governmental policy. Justice Brennan could have been writing about this case when he set forth the following hypothetical:

(Cont'd)
medical center without the benefit of a search warrant in order to "get the witnesses." *Id.* at 473. The Court held that the municipality was liable under section 1983 based on the "final policymaker's" unconstitutional decision on that single occasion.

> . . . the County Sheriff may have the discretion to hire and fire employees without also being the county official responsible for establishing county employment policy. If this were the case, the Sheriff's decisions respecting employment would not give rise to municipal liability, although similar decisions with respect to law enforcement practices, over which the Sheriff *is* the official policymaker, *would* give rise to municipal liability. Instead, if county employment policy was set by the Board of County Commissioners, only that body's decisions would provide a basis for county liability. This would be true even if the Board left the Sheriff discretion to hire and fire employees and the Sheriff exercised that discretion in an unconstitutional manner; the decision to act unlawfully would not be a decision of the Board. However, if the Board delegated its power to establish final employment policy to the Sheriff, the Sheriff's decisions *would* represent county policy and could give rise to municipal liability.

Id. at 484 n. 12. In our case, Bryan County stipulated *only* that: "At all times relevant hereto, Defendant Moore was the policy maker for Bryan County regarding the Sheriff's Department." (J.A. 30a). Like the fictional sheriff in the first part of Justice Brennan's hypothetical, Bryan County's stipulation says nothing about the source of *final* policymaking authority with respect to employment practices. Moreover, there is no evidence that Bryan County's Board of Commissioners delegated to Sheriff Moore the power to establish final employment policy.

As a result, there is no basis for section 1983 liability against the County based on the adoption of a final hiring policy.

More importantly, the record here establishes that Sheriff Moore's hiring of Burns was in conformity with explicit employment policy promulgated by the State of Oklahoma. (J.A. 48a, 50a). Oklahoma law provides the minimum hiring standards for peace officers and reserve deputies.[7] Neither Sheriff Moore nor Bryan County had the authority to override those requirements. *See Auriemma v. Rice*, 957 F.2d 397, 400-01 (7th Cir. 1992) (superintendent's authority to make final decision on demotion did not create authority to make personnel "policy" because the superintendent had no power to countermand specific statute). Since Sheriff Moore's discretionary hiring act was in compliance with Oklahoma law, which is itself constitutional, that statute (and not Sheriff Moore's individual hiring decisions) represents the relevant hiring policy. *See City of St. Louis v. Praprotnik*, 485 U.S. 112 (1988) (whether official has policymaking authority is question of state law)[8]; *Haworth v. Central Nat. Bank*, 769 P.2d 740, 743 (1989) ("Oklahoma statutes contain several provisions reflecting the state's direct intervention and control over law enforcement officers").

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7. Okla. Stat. Ann. Tit. 70, § 3311(d)(2)(a) (West 1994) provides that "[n]o person shall be certified as a police or peace officer in this state unless . . . such person has no record of a conviction of a felony or crime involving moral turpitude." In addition, Oklahoma provides for psychological testing and educational requirements (high school diploma or G.E.D. equivalency certificate). Okla. Stat. Ann. Tit. 70, § 3311(d)(2)(b)(c) (West 1994). "Any person found not to be suitable for employment or certification by the Council [on Law Enforcement Education and Training] shall not be employed . . ." Okla. Stat. Ann. Tit. 70, § 3311(d)(2)(b).

8. Although *Praprotnik* was a plurality decision, the Court adopted its analysis in *Jett v. Dallas Independent School District*, 491 U.S. 701 (1989) and expressly held that the question of who holds policymaking authority is one of state law properly determined by the District Court. *Id.* at 737.

3. Respondent Failed to Prove Causation for Inadequate Screening.

Consistent with its refusal to impose municipal liability based on *respondeat superior*, this Court has recognized that a section 1983 plaintiff must establish an "affirmative link" between the alleged "policy" and the claimed constitutional injury. *Tuttle*, 471 U.S. at 823. According to Respondent, the "affirmative link" here is the hiring of an individual with a "lengthy criminal record," which, she claims, evidences a deliberate indifference to the rights of those with whom Burns would come into contact. It is important, then, to review the constituent elements of Burns' record.

The offenses to which Burns pleaded guilty arose from a college fight. (J.A. 90a). Stacy Burns was 19 years old. The record reflects that he was confronted by a group from a fraternity pledge class, that the fight was initiated by one or more members of that class, and that a shoving match ensued. (J.A. 89a-90a). Apparently, the police were summoned and Burns was charged, but not convicted, of resisting arrest. (J.A. 43a, 81a, 100a). At the same time he pleaded guilty to misdemeanor assault and battery arising out of the fight, Burns entered plea agreements relating to traffic offenses, presentation of false identification, and for being in "Actual Physical Control" ("APC") of a motor vehicle while intoxicated. (J.A. 90a). *See Hoss v. State*, 738 P.2d 958 (Okla. Ct. App. 1987).[9]

There was no psychiatric or psychological testimony establishing that Burns' misdemeanor convictions for the college fight or driving offenses would directly lead to his using excessive force as a Reserve Deputy. Analysis of psychological test results is, in fact, utilized by the agency appointed by the

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9. Respondent's own expert characterizes misdemeanors as "minor" infractions. (Tr. 338).

State of Oklahoma to evaluate the fitness of Reserve Deputy candidates. The statute expressly provides that CLEET retains discretion to veto employment of "[a]ny person found not to be suitable for employment or certification by the Council . . ." Okla. Stat. Ann. Tit. 70 § 3311(d)(2)(b) (West 1994). There is no evidence that Burns' employment was precluded by CLEET.

Given the minor nature of Burns' offenses, Respondent has failed to demonstrate that Burns' background should have alerted Bryan County that he would, to a "moral certainty" exert more force than necessary when effecting an arrest. *See City of Canton v. Harris*, 489 U.S. 378, 390 n.10, 396 (1989)(municipal liability for inadequate training would require either pattern of similar incidents or proof that adoption of policy would, to a "moral certainty," result in violation of constitutional rights). Nothing in his background compels the conclusion that, despite training, supervision, psychological evaluations and testing, Burns would inevitably commit acts of unprovoked or excessive violence in contravention of the United States Constitution.

4. Respondent's Inadequate Hiring Claim Fails Under *City of Canton v. Harris*.

Those courts which have addressed claims of municipal liability based on inadequate hiring policies have followed the inadequate training paradigm of *City of Canton v. Harris*. Moreover, they have rejected the imposition of liability under circumstances where a municipality follows accepted hiring procedures of State or county law or relies on objectively reasonable criteria in reaching hiring decisions. *See Benavides v. County of Wilson*, 955 F.2d 968, 974-75 (5th Cir.), *cert. denied*, 506 U.S. 824 (1992) (reliance on fit-to-work letter without further investigation of mental disorders of officers not deliberately indifferent); *Graham v. Sauk Prairie Police Comm'n*, 915 F.2d 1085, 1096-97 (7th Cir. 1990) (police chief reliance on physician's return to work letter without obtaining

National Crime Information Center (NCIC) report or State criminal report not deliberately indifferent); *D.T. by M.T. v. Indep. School Dist. No. 16*, 894 F.2d 1176, 1179, 1193-94 (10th Cir.), *cert. denied*, 498 U.S. 879 (1990) (no deliberate indifference when policymaker follows state hiring procedure and relies on state certification to ensure that teacher lacked criminal record); *J.H. By D.H. v. West Valley City*, 840 P.2d 115, 120-21 (Utah 1992) (no deliberate indifference where municipality followed normal hiring procedures).

In order for municipal liability to attach to a facially constitutional policy, the policymaker must have actual or constructive notice that the policy's application will inevitably and to a *moral certainty* lead to constitutional violations. *City of Canton, supra* at 390 n. 10. This is the touchstone of deliberate indifference. In addition, the policy must be so closely related to the ultimate injury that it can be said that the municipality actually caused the constitutional violation. *Id.* at 391. In this case, the evidence is clear that Bryan County, in hiring Burns, transgressed no State law, violated no federal statute, offended no constitutional provision.

In resolving a municipality's liability for inadequate training, this Court has suggested a pragmatic approach. The Court, for example, has explained that a claim of inadequate training will not succeed on a mere showing that an otherwise sound program has been negligently administered on one occasion. *City of Canton*, 489 U.S. at 391. It is also insufficient to show that an enhanced policy would have prevented the injury-causing conduct, because that is virtually self-evident. *Id.* Finally, the Court has observed that there are times that even adequately trained officers make mistakes; "the fact that they do says little about the training program or the legal basis for holding the city liable." *Id.*

These same principles should pertain here. *See Graham v. Sauk Prairie Police Comm'n, supra*, 915 F.2d at 1100-1103. Proof that Sheriff Moore deviated from otherwise

unimpeachable hiring practices does not remotely suggest deliberate indifference. As this Court stated in *Tuttle:*

> . . . where the policy relied upon is not itself unconstitutional, considerably more proof than the single incident will be necessary in every case to establish both the requisite fault on the part of the municipality, and the causal connection between the "policy" and the constitutional deprivation.

Id. 471 U.S. at 824; *see also City of Canton v. Harris,* 489 U.S. at 432-33 (O'Connor, J., concurring). There is no reason to deviate from that standard in this case. Respondent has not shown that Bryan County adopted a "policy" of inadequate screening and, moreover, has failed to prove it was foreordained that a person with one misdemeanor conviction for assault and battery would violate a citizen's constitutional rights despite the training, supervision, psychological evaluation, and threat of termination that are part and parcel of the hiring decision itself.

5. The Fifth Circuit's Superseded Opinion Correctly Analyzed Respondent's Failure-to-Train Theory.

In her response to Bryan County's Petition for Writ of Certiorari, Respondent suggested that the District Court's judgment was supported by the jury's finding on inadequate training. Respondent's Brief in Opposition at 14-15. Respondent failed to mention, however, that the Fifth Circuit, in its prior opinion, concluded that her inadequate training claim failed as a matter of law. In reaching that result, the Fifth Circuit correctly reasoned that:

> A review of the record reveals that Sheriff Moore had enrolled Burns in the state-mandated Council on Law Enforcement Education and Training (CLEET) program

> while he worked as a Reserve Deputy. As there is no evidence that Sheriff Moore did anything less than that which is required by law, we do not find the training practices inadequate. *See Benavides v. County of Wilson*, 955 F.2d 968, 973 (5th Cir.), *cert. denied*, __ U.S. __, 113 S.Ct. 79, 121 L. Ed. 2d 43 (1992). Although Mrs. Brown's expert urged that additional instructional programs were necessary to supplement the CLEET course and on-the-job training, there is no evidence suggesting that the training standard required by law was inadequate to enable the deputies to deal with "usual and recurring situations" typically faced by peace officers. *See id.* In addition, failure-to-train cases — unlike the negligent-hiring cases — *specifically* require more than a single instance of injury or an isolated case of one poorly trained employee before municipal liability can attach. . . . As Mrs. Brown claims that only Burns was inadequately trained and cites neither to other similar incidents nor widespread misbehavior, her claim alleging inadequate training must fail.

Brown v. Bryan County, OK, 53 F.3d 1410, 1424-25 (5th Cir. 1995) (*"Brown I"*), *superseded by, Brown v. Bryan County OK*, 67 F.3d 1174 (5th Cir. 1995)(*"Brown II"*). The court's prior analysis of inadequate training was correct, as demonstrated above; its error was in failing to apply that same analysis to Brown's "negligent-hiring" claims. Contrary to Brown's suggestion at pages 14-15 of her Brief in Opposition, the court's purging of that analysis in the second opinion does not establish

an independent ground for affirmance. *See Brown II, supra* at 1178 (declining to address Bryan County's challenge to inadequate training).

II.

MONELL'S REJECTION OF *RESPONDEAT SUPERIOR* LIABILITY EMBODIES THIS COURT'S CONCERN THAT PRINCIPLES OF FEDERALISM ENSURE A PROPER BALANCE BETWEEN HOLDING A MUNICIPALITY ACCOUNTABLE FOR VIOLATING CONSTITUTIONAL RIGHTS, WHILE PRESERVING STATES' AUTHORITY TO ADMINISTER THEIR OWN LAWS UNENCUMBERED BY EXCESSIVE FEDERAL-COURT INTERFERENCE.

Before anything else can be said about the interrelationship between section 1983 and principles of federalism, Petitioner hastens to acknowledge that the Civil Rights Act of 1871,[10] drastically "altered the relationship between the States and the Nation with respect to the protection of federally created civil rights." *Mitchum v. Foster*, 407 U.S. 225, 242 (1972). Its draftsmen intended, and largely achieved, a profoundly enhanced federal power to protect citizens from unconstitutional action under color of state law. *Id.* It did *not* go so far, however, as to strip States of authority to promulgate perfectly constitutional legislation pertaining to the day-to-day administration of their own affairs. *Monell*, 436 U.S. at 693-95.

Proponents of the "Sherman Amendment" to the Civil Rights Act of 1871 wanted to make municipalities directly liable for mob violence against the enjoyment or exercise of federal

10. What is now section 1983 was enacted as section 1 of "An Act to Enforce the Provisions of the Fourteenth Amendment to the Constitution of the United States and For Other Purposes," Act of April 20, 1871, ch. 22, 17 Stat. 13.

civil rights.[11] *Id.* at 691-92. Judgments in such actions were to be enforceable through a "lien . . . upon all moneys in the treasury of such county, city, or parish, as upon the other property thereof." Cong Globe, 42d Cong, 1st Sess, 663, 755 (1871). The opposition to that amendment came not only from those hostile to the interposition of federal courts into previously sacrosanct State activity, but also from proponents of the original Civil Rights Act of 1866.

For example, Senator Lyman Trumbull, who was chairman of the Judiciary Committee and instrumental in passage of the 1866 Civil Rights Act, was one of the most outspoken critics of the proposal. Eric Foner, *Reconstruction: America's Unfinished Revolution, 1863-1877*, 456 (New York, Harper & Row 1988). The proposal, he urged, asserted "principles never before exercised on the part of the United States at any rate." Cong Globe, 42d Cong, 1st Sess, 758 (1871). Likewise, Representative Blair condemned the sweeping nature of the proposal:

> The proposition known as the Sherman amendment — and to that I shall confine myself in the remarks which I may address to the House — is entirely new. It is altogether without a precedent in this country. Congress has never asserted or attempted to assert, so far as I know, any such authority. That amendment claims the power in the General Government to go into the States of this Union and lay such obligations as it may please upon the municipalities, which are the creations of the States alone.

11. A thorough canvassing of the legislative history of the 1871 Act is contained in *Monell, supra*.

Id. Mr. Poland, House Manager of the Conference Committee Report, stated that: "the House had solemnly decided that in their judgment Congress had no constitutional power to impose any obligation upon county and town organizations, the mere instrumentality for the administration of State law." Cong Globe, 42d Cong, 1st Sess, 804 (1871).

Of course, the legislative history surrounding enactment of the Act of 1871 has been studied extensively by this Court in prior opinions. *Monroe v. Pape*, 365 U.S. 167 (1961); *Aldinger v. Howard*, 427 U.S. 1 (1976); *Monell v. Dept. of Social Services of New York*, 436 U.S. 658 (1978); *Jett v. Dallas Independent School District*, 491 U.S. 701 (1989). It is offered here to emphasize three points which are critical to the disposition of this case.

First, in the extraordinary climate engendered by the North's triumph over the South in the aftermath of the Civil War — at a time of vastly expanded federal prerogative *vis a vis* state sovereignty — the Reconstruction-era Congress recognized that its reach did not exceed the limits imposed by the United States Constitution as an institutional restraint on Congress' authority to impose upon the States extra-constitutional obligations. Indeed, Congressional recognition of the wisdom of limiting raw federal power evidenced loyalty to the Founding Fathers' plans for the polity.

The Founding Fathers expressed concern that "ambitious encroachments of the federal government on the authority of State governments would not excite the opposition of a single State, or of a few States only. They would be signals of general alarm." *The Federalist No. 46*, p. 298 (C. Rossiter ed. 1961). At least in part, the Founders' struggle to preserve a national government presupposed fidelity to States' retention of control over their own internal affairs.

Second, in areas (as here) where State laws are not themselves unconstitutional, the bulwark of federalism promotes, rather than hinders, accountability of the State government to its citizens. Recently, Justice Kennedy observed that if encroachment on the balance between the national and State power were left unchecked, "the boundaries between the spheres of federal and state authority would blur and political responsibility would become illusory." *United States v. Lopez*, 514 U.S. __, __, 115 S. Ct. 1624, 1638 (1995) (Kennedy, J., concurring).

In our case, there is no constitutional impediment to Oklahoma's decision to vest its counties with authority to employ whom it chooses as reserve deputies, within express limits provided by statute. That policy, in and of itself, is not the proper subject of federal court intervention. In a very similar context, this Court has rejected the proposition that federal courts have authority to order local government agencies to implement procedures, acceptable to the court, for handling citizens' complaints about the conduct of their law enforcement agencies. *Rizzo, supra*, 423 U.S. at 380.

If a federal court may legitimately conclude that Stacy Burns' misdemeanors "preclude" his employment notwithstanding State law to the contrary, why should it not be entitled to forbid the hiring of *any* applicant with a history of misdemeanor arrests?" Or, as Respondent suggests, why should it not have the power also to preclude Bryan County from hiring applicants who profess ideas the court finds inappropriate? Respondent's Brief in Opposition at 11.

Such decisions are left to the States precisely because it is "essential to the independence of the States, and to their peace and tranquility, that their power to prescribe the qualifications of their own officers . . . should be exclusive, and free from external

interference, except so far as plainly provided by the Constitution of the United States." *Gregory v. Ashcroft*, 501 U.S. 452, 460 (1991), *quoting Taylor v. Beckham*, 178 U.S. 548, 570-571 (1900).

Third, the expanded scope of federal oversight of State personnel decisions envisioned by the lower court would be virtually impossible to administer. Under the lower court's reasoning, federal juries and judges would become super-legislators, empowered to craft minimum qualifications for State employees that exceed those enacted by State legislatures. What had been an essentially *political* decision regarding a State's allocation of resources for the selection, training and evaluation of law-enforcement personnel, would devolve into *ad hoc* determinations by courts that certain yet-to-be-identified classes of applicants are "unfit" for service.

How are States to predict which components of a police applicant's prior background would survive a federal court's litmus test for service? The Fifth Circuit's opinion provides no guidance. We are told that a "propensity for violence" and "disregard for the law" bar law enforcement service, but where is the limiting principle in the "standard"? *Brown II*, *supra* at 1183. Federalism concerns are greatest when a federal court's intervention in State affairs can neither be justified as a matter of constitutional principle nor limited by defined boundaries. *See United States v. Lopez*, 514 U.S. at __, 115 S. Ct. at 1626, *quoting The Federalist No. 45*, pp. 292-293 (C. Rossiter ed. 1961) ("[t]he powers delegated by the proposed Constitutional to the federal government are few and defined. Those which are to remain in the State governments are numerous and indefinite.").

This third point is especially troublesome precisely because it foreshadows a wholly inefficient federal oversight over State administration of basic law enforcement. *See The Federalist No.*

46, p. 298 (C. Rossiter ed. 1961) (". . . it is only within a certain sphere that the federal power can, in the nature of things, be advantageously administered"). As noted above, this is not the first time this Court has faced the question. In *Rizzo*, the district court's injunction was held to violate principles of federalism precisely because it interfered with "the internal disciplinary affairs of the state agency." 423 U.S. at 380. In the case *sub judice*, the effect of the lower court's holding is to place a shadow injunction on the State of Oklahoma's statutory qualifications for reserve deputy and peace officer employment, which countermands Oklahoma's ability to exercise its own judgment in an area to which it lay claim "by right of history and expertise." *United States v. Lopez*, *supra*, 514 U.S. at __, 115 S. Ct. at 1641 (Kennedy, J., concurring).

By substituting its own minimum standards for those enacted by the State of Oklahoma, the Fifth Circuit has placed itself in the position of "final policymaker" with respect to hiring decisions. Such a result signals a drastic departure from this Court's settled jurisprudence rejecting *respondeat superior* liability for local government units and would precipitate federal court intervention in the day-to-day promulgation and enforcement of State policy.

This Court has appropriately answered these questions in a manner that is consistent with principles of federalism. When it is established that the State's policies are unconstitutional in and of themselves, or (if constitutional) would inevitably result in constitutional deprivations, then the authority of the federal court, through the remedial mechanism of section 1983, is appropriately enlisted. Absent those conditions, federal intervention is an unwarranted intrusion into the prerogative of agencies to exercise the discretionary authority entrusted to them by the State.

CONCLUSION

The decision of the court of appeals should be reversed.

Respectfully submitted,

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(8)

No. 95-1168

In The
Supreme Court of the United States
October Term, 1995

THE BOARD OF THE COUNTY COMMISSIONERS OF BRYAN COUNTY, OKLAHOMA,

Petitioner,

v.

JILL BROWN,

Respondent.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Fifth Circuit

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QUESTIONS PRESENTED

1. Whether compliance with state law minimum requirements for hiring (and training) police officers insulates a municipality from § 1983 liability even when a jury reasonably decides that a municipal policymaker's particular hiring and training decisions were so inadequate as to amount to deliberate indifference to citizens' constitutional rights?

2. Whether, as a matter of law, to establish municipal liability under § 1983, a plaintiff must establish at least two deliberately indifferent hiring decisions (or two deliberately indifferent training decisions) by a municipal policymaker, before she can recover for the particular constitutional deprivation she suffered as a direct result of official municipal deliberate indifference?

3. Whether, as a matter of law, a § 1983 plaintiff must demonstrate prior incidents of police excessive force, even when unnecessary to establish that a deliberately indifferent official action taken by the municipality itself directly caused her particular constitutional injury?

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STATEMENT OF THE CASE

Bryan County's Statement of Facts reads as if the jury had resolved all contested fact issues in its favor. The verdict in favor of Jill Brown, however, indicates that the jury simply did not accept Petitioner's version of the traffic incident, or its position that the hiring and training of Stacy Burns was adequate in light of the duties he was assigned.

Throughout its Brief, Bryan County consistently understates the volume of evidence showing that it acted with deliberate indifference when its undisputed official policymaker on matters of hiring and training police officers,[1] Sheriff B.J. Moore, decided to employ his nephew, Stacy Burns, to be a reserve officer. At the time Bryan County hired him to be a law enforcement officer, Burns had a lengthy criminal record of arrests and convictions: Assault (two counts), Resisting Arrest, Public Drunkenness, Driving While

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[1] "Undisputed," that is, until now. For the first time in any court, Petitioner now claims that Sheriff Moore was not its "final" policymaker. (P. Br., 19). Pretrial, the County stipulated that "[a]t all times relevant hereto, Defendant [Sheriff] Moore was the policymaker for Bryan County regarding the Sheriff's Department," J.A. 30, and additionally took the position that its Board of County Commissioners "did not participate in any policy decisions with regard to the conduct and operation of the office of the Bryan County Sheriff." J.A. 32. The Joint Pre-Trial Order lists 61 contested issues of fact and 8 contested issues of law, but the Sheriff's policymaking authority was not among them. R. 3/856-63. (partially reproduced at J.A. 31-32). In Bryan County's opening statement, it stated, "We agree that the Sheriff made the policy insofar as the Sheriff's Department was concerned." Tr. 24. The Sheriff's testimony also acknowledged that he was the decisionmaker for the County regarding the Sheriff's Department. J.A. 114. Moreover, the County made no objection to the portion of the jury charge that stated, "Sheriff B.J. Moore is an official whose acts constitute final, official policy of Bryan County, Oklahoma." J.A. 122. The County never raised the issue on appeal and the Fifth Circuit noted that it had been waived. *Brown v. Bryan County*, 67 F.3d at 1182 n.17. Neither did Bryan County raise this dead issue in its Petition for Writ of Certiorari.

Intoxicated, False Identification, Driving While License Suspended, and nine moving traffic violations. J.A. 40-43, 88-91. Sheriff Moore was aware of Burns' lengthy criminal history. J.A. 45-46, 111, 114-15. Nevertheless, when Sheriff Moore acquired Burns' rap sheet, he did not read it carefully. J.A. 114-15. Moore admitted on cross-examination that he did not notice the assault conviction, did not notice the resisting arrest, did not notice the public drunkenness, and did not notice the false identification. J.A. 115. While being pressed about his alleged failure to notice these crimes, Moore excused his inattention with the explanation: "He had a long record." J.A. 115.[2] Sheriff Moore admittedly made no further inquiry into the disposition of any of the charges or convictions, and made no attempt to determine whether Burns was currently on probation. J.A. 115-16. If he had, he would have discovered that there was an outstanding warrant for Burns' arrest for violating conditions of probation. J.A. 41-43, 102-03. Burns not only failed to pay fines and failed to perform community service, he also violated his probation by continuing to commit crimes including the assault, the public drunkenness, the driving while license suspended, and the false identification. J.A. 42-43. Despite Sheriff Moore's awareness that Burns had a long criminal record, despite the absence of a background investigation which would have shed additional light on Burns' character, and despite Moore's knowledge that Burns would be making forcible arrests prior to receiving any meaningful training, Moore made the decision to hire Burns, and did so pursuant to his status as the decisionmaker for Bryan County. J.A. 114.

Plaintiff's law enforcement expert, Dr. Otto Schweizer, a professor of criminal justice and police administration at The

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[2] Of course, as the Fifth Circuit noted, it is possible that the jury did not believe Sheriff Moore when he professed ignorance of some of the more serious details of his nephew's record. 67 F.3d at 1184. Indeed, Moore also testified that he did not consider a history of misdemeanor arrests and convictions to be a "criminal record," J.A. 115, explaining that he did not believe that "assault and battery would stop anybody from being a good police officer. . . . " J.A. 111.

University of Central Oklahoma and a veteran of 20 years in law enforcement, several years as a field training officer and several more as a police chief, Tr. 297-302, testified to Burns' unfitness for police work. According to Dr. Schweizer, Burns was unfit to be a police officer because of excessive convictions and an arrest record that showed a blatant disregard for the law, and a potential for "abusing the public or using excessive force." Tr. 316. Even Defendants' own expert repeatedly expressed "concern" about Burns' fitness and conceded that it was doubtful that he would have hired Burns. J.A. 78-84. In the face of this damaging testimony, Bryan County clung desperately to its position that state law minimum requirements did not absolutely disqualify Burns. J.A. 49-50.[3]

Stacy Burns testified that, prior to beginning work as a reserve officer, he had no experience as a law enforcement officer. J.A. 94. Despite that lack of experience, and his criminal history, Bryan County Sheriff's Department provided no formal departmental training to Burns. J.A. 93-94. Indeed, the County had no formal training program at all. J.A. 47, 93-94, 116-17; Tr. 327-31.[4] Bryan County's reliance on the training Burns allegedly received at Oklahoma's state training program (known as CLEET) is wholly disingenuous. Burns did not even apply for classes until May 6, 1991, a scant 6 days prior to his use of excessive force against Jill Brown. J.A. 74-75. Because the classes were held only three days a

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[3] Sheriff Moore's assertion at trial that he received Burns' lengthy record but did not fully read it demonstrates how disingenuous it is for Petitioner to argue that Sheriff Moore was relying on state law minimums that absolutely disqualified only felons. How could Sheriff Moore "rely" on the fact that Burns was not a felon if Moore did not even bother to read the whole record?

[4] Although Burns stated in his deposition that he had received no training at all through Bryan County, formal or otherwise, he did assert at trial that he had viewed one or more television programs broadcast on a state law enforcement training channel. Tr. 579, 601. Burns also testified that he had ridden with his grandfather, Reserve Deputy Calclazier, "several" times in civilian clothes prior to being hired. Tr. 579.

week, Tr. 578. Burns had at most three sessions of CLEET training prior to injuring Jill Brown.[5] Burns' general lack of training was also reflected in the absence of any specific instruction regarding situations likely to arise while conducting a "state line" road block. To wit, Burns received no training regarding roadblock procedures, J.A. 94; Tr. 605, 679-680, no training regarding pursuit across state lines, J.A. 94, and no training regarding his authority to arrest in Texas. J.A. 95. Moreover, he received no supervision during the incident involving Jill Brown, J.A. 95-96, and no instructions during the pursuit. Tr. 609. Despite this absence of training, experience, and supervision, Sheriff Moore authorized Burns to make forcible arrests. J.A. 96. Burns apparently enjoyed this authority since, of his first thirteen arrests, he forced the arrestee to the ground at least *five* times, Tr. 628, a record of force that law enforcement expert Schweizer characterized as "unusually high and excessive." Tr. 394.

Although not basically relevant to the municipal liability issues raised in its brief, Bryan County includes in its fact statement a lengthy one-sided description of the events on May 12, 1991, apparently to suggest that Officer Burns did not *really* subject Jill Brown to excessive force. But Bryan County's version of the events immediately preceding and during the traffic stop in which Jill Brown was injured was hotly disputed at trial; and, as the Fifth Circuit ruled, there was plenty of evidentiary support for the jury's decision to believe plaintiff's version of the events. 67 F.3d 1174, 1178-81. What was *not* in dispute is that Todd Brown saw a

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[5] Indeed, there was evidence introduced on which the jury could have based a finding that Burns had not attended *any* CLEET classes prior to his attack on Jill Brown. After claiming in his deposition that he had received several months of CLEET training prior to May 12, 1991 (the Jill Brown incident), Burns suffered a memory loss at trial (regarding the number of CLEET classes he had attended) after plaintiff established that he had not even applied for CLEET training until May 6, 1991. Tr. 516, 577, 600, 608. Moreover, the jury was familiar with Burns' record, which revealed a disregard both for the law and for truthfulness (the false identification); and he also admitted lying during his deposition. J.A. 91.

roadblock in Oklahoma shortly after crossing the Texas state line, turned around and drove back into Texas, and was stopped by Bryan County officers shortly thereafter on a side road that led to his mother's house. On about every other fact issue there was conflicting testimony – both as to what occurred prior to the traffic stop,[6] and what occurred after the stop. Jill Brown testified that, after the stop, she heard two commands to get out of the vehicle, was doing exactly what Burns told her to do, and was not slow to respond. Tr. 53-54, 94. After starting to exit the vehicle with her hands in the air, Burns grabbed her by the left arm, spun her around, and "threw" her to the ground. Tr. 52-53.[7] She was not able to break her fall as one hand was in the air and Burns had hold of the other. Tr. 53. Ms. Brown landed on the pavement, knees first, with Burns' knees in her back. Tr. 54-55. She testified that, prior to being thrown to the ground, she was not slow to respond to any commands, did not reach for anything, or do anything that would lead Burns to believe she was reaching

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[6] Mr. Brown testified that he was familiar with the checkpoint, and chose not to go through it because he had been unnecessarily detained there on prior occasions for up to fifteen minutes. Tr. 134. (Indeed, Jill Brown and her husband had previously complained to Oklahoma officials about these roadblocks near the Texas border, complaining about unnecessary delays and being hassled by the deputies. Tr. 41-42, 134.). Mr. Brown decided to turn around and spend the night at his mother's home, which was a few miles back across the border in Texas. Tr. 134, 138. When turning around, his tires did not squeal and did not throw any gravel. Tr. 135. He neither turned around, nor came out of the turn, nor drove back toward Texas, at a high rate of speed. Tr. 136-37. After crossing the dam into Texas, he turned off the main road, taking his normal route to his mother's house. Tr. 138-39. After he realized the police were following him, he pulled off the road at the first available safe opportunity. Tr. 142-43.

[7] Petitioner characterized this as the "lowest level of force" available. (P. Br., 7). That description, however, referred to a *properly executed* arm-bar takedown, not spinning someone around and throwing them hard to the pavement. Tr. 392, 541. Moreover, there was no need to use *any* degree of force on Jill Brown. Tr. 347-48.

for anything. Tr. 54-55. (Given Burns' lengthy criminal record, which revealed a disturbing disregard for the law, and given that Burns admitted previously lying under oath, J.A. 91, it is hardly surprising that the jury rejected his version of the events.)[8] The Fifth Circuit found sufficient evidence to support the jury's finding that Burns used excessive force. 67 F.3d at 1180.[9] As a result of Stacy Burns' actions, Jill Brown has had four operations, two on each knee, and will require additional surgery, eventually culminating in total knee replacements. Tr. 261, 267-72.

At trial, Jill Brown established the three elements necessary to demonstrate that Bryan County was sufficiently at fault for its employee's constitutional tort to justify the imposition of § 1983 *municipal* liability: 1) a municipal "policy," pursued with 2) deliberate indifference, which 3) proximately caused the constitutional deprivation. First, Bryan County conceded that Sheriff Moore was the County's official policymaker with exclusive and final policymaking authority regarding the hiring and training of county law enforcement officers including Officer Burns. J.A. 30, 32. Second, the jury's verdict expressly found that the County, through its policymaker on matters of hiring and training, was deliberately indifferent to Jill Brown's constitutional rights, both with respect to the improper hiring and inadequate training of Burns. J.A. 135. Third, the jury found that Jill Brown's

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[8] When Jill Brown cried out upon being thrown to the pavement, Todd Brown attempted to check on his wife's condition and was repeatedly punched. While being beaten, Mr. Brown says he exclaimed, "This is just like L.A., huh, boys," to which Burns responded, "No, this is a hell of a lot worse." Tr. 150. Burns later returned to where Jill Brown lay on the pavement, arms handcuffed behind her back, and jerked her up by the chain between the cuffs. Tr. 57.

[9] The Fifth Circuit also found sufficient evidence to support the jury's finding of false arrest and false imprisonment. 67 F.3d at 1180-81. Jill Brown had committed no crime, yet, after being slammed to the pavement, she remained handcuffed there for approximately one hour, during which time she was never informed why she was being detained. *Id.* And no charges were ever brought against her. *Id.* at 1181.

injuries (from the excessive force) were proximately caused by the deliberate indifference of Bryan County's official policymaker. *Id.* The Fifth Circuit affirmed the jury's verdict of municipal liability, finding that the jury's verdict was supported by the evidence. *Brown v. Bryan County*, 67 F.3d 1174, 1185 (5th Cir. 1995). The Fifth Circuit's affirmance was properly deferential to the jury's resolution of conflicting evidence, and its analysis was, accordingly, very fact-intensive. *Id.* at 1178-85. Contrary to Petitioner's assertions, the Fifth Circuit never created absolute federal minimums for a state's employment of law enforcement officers. *See id.* A fair reading of the Fifth Circuit's opinion reveals that it held only that, based on the particularly egregious evidence presented in this case, the jury could reasonably find that Bryan County's policymaker acted with deliberate indifference when hiring Burns, *id.* at 1183-85, and that such deliberate indifference directly caused the constitutional deprivations (excessive force, unlawful arrest) suffered by Jill Brown. *Id.* at 1185.[10]

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[10] Bryan County did not raise a challenge in its Petition for Writ of Certiorari to the inadequate *training* portion of Jill Brown's verdict, which the Fifth Circuit left undisturbed and undiscussed, stating early in its opinion, "[f]or efficiency's sake, we will address only those points that we believe merit review." 67 F.3d at 1178. (Petitioner's reliance on a withdrawn opinion that had initially reversed the training verdict is extraordinary; and common sense would, in any event, suggest that the opinion was withdrawn precisely because the court thought its training reversal was erroneous.) Analysis of Jill Brown's "bad training" claim simply requires a straightforward application of *Canton*. *Canton* expressly envisioned that deliberate indifference could be established based on a failure to train a particular officer. 489 U.S. at 390-91. (In any event, Plaintiff established at trial that Bryan County had *no* departmental training program. J.A. 47, 93-94, 116-17; Tr. 327-31.) Additionally, *Canton* emphasized that municipal deliberate indifference does not depend on multiple incidents of constitutional deprivations when the training inadequacy relates to those recurring constitutional obligations (such as avoiding excessive force) that police officers are certain to confront. 489 U.S. at 390 n.10; *see also* 489 U.S. at 396 (O'Connor., J., concurring in part). Therefore, regardless of what this Court does with the "bad hiring"

SUMMARY OF ARGUMENT

Section 1983's language, by addressing persons acting "under color of [state] law," expressly forecloses a municipal "defense" to liability based on municipal compliance with state law. Indeed, one of the primary aims of § 1983 was to provide a remedy when state law was inadequate to protect federal constitutional rights. Bryan County's view, if accepted, would permit states to insulate their governmental subdivisions from § 1983 liability by passing easy-to-meet minimum requirements covering all the typical duties that municipalities perform. Since those state law minimums often will not be adequate to protect federal constitutional rights, Petitioner's view would effectively "repeal" § 1983. Although this Court in *City of Canton v. Harris*, 489 U.S. 378, 392 (1989), expressed concern about "federal court second-guessing" of local training decisions, the Court alleviated those concerns by requiring plaintiffs to prove municipal "deliberate indifference," a standard of proof met by Jill Brown both with respect to her "bad hiring" and "bad training" claims. Any remaining federalism concerns implicated by this case surely are attributable to § 1983 itself rather than the particular application of § 1983 to Bryan County's official employment and training decisions regarding Officer Burns. Moreover, it is disingenuous for Bryan County to argue that Sheriff Moore was relying on state laws that absolutely disqualified only felons, since Moore admitted on the witness stand that he did not fully read Burns' lengthy criminal history. In any event, Petitioner has failed to explain how this lawsuit is a threat to facially constitutional state laws when it neither challenges nor frustrates Oklahoma's minimum qualifications to be a police officer. Unless Oklahoma state law mandates the hiring of all non-felon applicants, § 1983's application to inadequate hiring decisions surely *complements* state law. Finally, nothing in § 1983 prevented Bryan County from putting on evidence of compliance with state law, which

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claim, the "bad training" verdict must be upheld unless this Court substantially retracts its opinion in *Canton*.

it did, in an attempt to persuade the jury that it was not "deliberately indifferent." The jury in the present case, however, was more persuaded with plaintiff's specific and egregious evidence of municipal deliberate indifference, than with Bryan County's evidence of accidental bare-bones compliance with generic state law minimums. The Fifth Circuit's fact-intensive inquiry merely upheld the jury's finding of deliberate indifference and in no way crafted federal minimum hiring standards as Petitioner claims.

Municipal fault under § 1983 is established by proving: 1) an official municipal "policy," which includes an official decision by a final policymaker on a matter within the policymaker's sphere of authority; 2) that the official municipal action (or inaction) showed deliberate indifference to citizens' constitutional rights; and 3) that the municipality's deliberately indifferent official action directly caused the plaintiff's constitutional injury. *See Monell v. New York Dept. of Social Services*, 436 U.S. 658, 694 (1978); *Pembaur v. Cincinnati*, 475 U.S. 469, 480 (1986); *City of Canton v. Harris*, 489 U.S. 378, 388-91 (1989). Together, these three requirements constitute the fundamental components of civil or criminal fault: 1) conduct, including an act or omission; 2) a culpable mental state; and 3) causation of the injury. The point of this Court's decisions in *Monell*, *Pembaur*, and *Canton* is to ensure that municipalities are liable for constitutional torts committed by municipal employees *only* when a § 1983 plaintiff establishes that *the municipality itself* is at fault. Thus, when a plaintiff proves official *municipal* conduct, a *municipal* culpable mental state of deliberate indifference, and *municipal* causation of the constitutional injury, it is appropriate for the municipality and not just its employee to shoulder the blame for the plaintiff's constitutional injury.

Because Jill Brown proved all three components of municipal fault, this case in no way involves an application of *respondeat superior*. First, Bryan County conceded at trial that Sheriff Moore was its exclusive official policymaker regarding matters of hiring and training police officers. This Court has ruled that a single decision by a municipal policymaker on a matter that is within his sphere of policymaking

authority is an official *municipal* action (or "policy"). *Pembaur*, 475 U.S. at 480-81. Therefore, Moore's decision to hire Burns despite a lengthy criminal record revealing lawlessness and violence, and his further decision to authorize Burns to make forcible arrests prior to receiving any meaningful training, were decisions made *by the municipality itself*. Additionally, because of the certainty that police officers will face recurring constitutional obligations regarding the use of force, the jury reasonably decided that Bryan County's decisionmaking was so inadequate as to amount to municipal deliberate indifference to citizens' constitutional rights. *See Canton*, 489 U.S. at 390 & n.10. Finally, it is difficult to conceive of a constitutional deprivation more "closely related to" Bryan County's deliberately indifferent decisionmaking than excessive force. Indeed, it was the extreme threat of precisely that constitutional injury that made the County's decisions about Burns "deliberately indifferent." In sum, Jill Brown established deliberately indifferent official municipal decisionmaking that directly caused the most natural constitutional deprivation imaginable under the circumstances. That is *municipal fault*. In no way, shape, or form, is this a case of *respondeat superior*.

Stripped of its illusory federalism and *respondeat superior* concerns, this case is revealed as nothing more than a municipal desire for a "preference" – a preference supported by neither statutory language, this Court's precedent, common law tort principles, or common sense. This preference would be unavailable to natural "persons" in § 1983 litigation, just as it is unavailable to any defendant – whether natural person, private corporation, or municipal corporation – in any other tort law context. This "preference" would require plaintiffs to establish *multiple* constitutional torts (but only when suing municipalities and only when suing under § 1983!) This "multiple torts" requirement takes two forms: 1) multiple instances of municipal deliberate indifference, and 2) multiple incidents of similar constitutional deprivations.

First, Bryan County argues that it was only at fault once – it engaged in "bad hiring" and "bad training" only with respect to Officer Burns. This argument would not only

redefine fault, but it would require an interpretation of *Monell*'s "policy" requirement that is completely cut loose from its *Monell* moorings – the rejection of *respondeat superior*. Moreover, Bryan County's "multiple fault" doctrine would require this Court to overrule *Pembaur*'s common sense view that municipal power is not just within the province of legislative bodies and not just manifested by standard rules of operation. *See* 475 U.S. at 480-81. Rather, official municipal power can be exercised by policymaking officials (like a Sheriff) and can be exercised in a case-specific fashion. *Id.* Indeed, *Canton* expressly envisioned liability based on the inadequate training of specific officers, 489 U.S. at 390-91, and Bryan County does not dispute that *Canton* should also govern "bad hiring" claims.

Second, Bryan County argues that its deliberate indifference caused constitutional deprivations on only one occasion. Such a "multiple incidents" requirement has no basis in statutory language, contradicts much of this Court's precedent, and literally would change the substantive definition of a constitutional tort. *Canton*'s "deliberate indifference" standard of municipal mental culpability already ensures that a municipality will have sufficient notice to provide it an opportunity to avoid liability. Because of *Canton*, there may be some cases where a § 1983 plaintiff needs to introduce evidence of prior similar deprivations in order to prove municipal deliberate indifference to citizens' constitutional rights. But to require proof of "multiple incidents" as a matter of *law*, even in those cases where a plaintiff can otherwise demonstrate that her constitutional injury directly resulted from deliberately indifferent official actions taken by the municipality itself, is wholly arbitrary. In those cases – where the municipality has sufficient notice to avoid the injury and, consequently, sufficient notice to be deemed "deliberately indifferent" – an unyielding "multiple incidents" requirement would free municipalities from their own municipal fault rather than shield them from *respondeat superior*. And in "bad hiring" cases, it would mean that only post-employment notice is relevant; pre-employment notice would not count, no matter how clearly it portends a particular constitutional

deprivation. *Canton* has already answered this question in "bad training" cases, by recognizing that municipal fault does not depend on multiple incidents when the municipal training deficiency relates to those recurring constitutional obligations – such as avoiding excessive force – that police officers will certainly face. 489 U.S. at 390 n.10; *see also* 489 U.S. at 396 (O'Connor, J., concurring in part). If municipalities inherently are on notice of such recurring constitutional needs when *training* police officers, the same must be true when *hiring* those officers. And when Bryan County hired Officer Burns, it had notice not only of those constitutional obligations regarding the use of force that confront police officers in recurring situations, it had notice that Burns was particularly unfit to perform those obligations, at least without substantial training. This is simply not a case where proof of multiple incidents is necessary to show municipal fault.

ARGUMENT

I. IMPOSING LIABILITY DESPITE MUNICIPAL COMPLIANCE WITH STATE LAW IS EXPRESSLY AUTHORIZED BY § 1983 AND IMPLICATES NO FEDERALISM CONCERNS OTHER THAN THOSE SUBSUMED BY § 1983'S BASIC ALTERATION OF OUR FEDERAL SYSTEM.

This Court has never doubted that actions consistent with state law are within the scope of § 1983; indeed, this Court once considered whether the scope of § 1983 is *limited* to action taken consistently with state law. *See Monroe v. Pape*, 365 U.S. 167, 172 (1961). By imposing liability for federal constitutional violations caused by persons acting "under color of state law," § 1983 expressly forecloses any argument that a municipality is insulated from liability simply because its actions are authorized by, or not inconsistent with, state law. Bryan County's view stands § 1983 on its head – a citizen's federal constitutional rights would become subservient to, and revocable at the whim of, rather than protected from, persons acting under color of state law.

Viewed in light of the historical background and legislative purposes of the Civil Rights Act of 1871, Bryan County's federalism concerns are wholly illusory. As this Court recognized in *Patsy v. Board of Regents of Fla.*, 457 U.S. 496, 503 (1982), "[t]he Civil Rights Act of 1871, along with the Fourteenth Amendment it was enacted to enforce, were crucial ingredients in the basic alteration of our federal system accomplished during the Reconstruction Era." The Fourteenth Amendment was, of course, a direct restriction of state power, and it expressly empowered Congress "to enforce by appropriate legislation the provisions of this article." In *Ex parte Virginia*, 100 U.S. 339, 346-47, 25 L.Ed. 676 (1880), the Supreme Court observed that the power given to Congress by the Fourteenth Amendment was, necessarily, the power to enforce its prohibitions "against state action, however put forth, whether that action be executive, legislative or judicial." And because the people of the States, by amending the Constitution, so empowered Congress, laws passed in pursuance of that enforcement power constitute "no invasion of state sovereignty." *Id.* Section 1983 is just such a law: "[t]he very purpose of § 1983 was to interpose the federal courts between the States and the people, as guardians of the people's federal rights." *Mitchum v. Foster*, 407 U.S. 225, 242 (1972). In examining the legislative history of § 1983's predecessor, this Court found three main aims: 1) "it might, of course, override certain kinds of state laws"; 2) "it provided a remedy where state law was inadequate"; and 3) "it provide[d] a federal remedy where the state remedy, though adequate in theory, was not available in practice." *Monroe*, 365 U.S. at 173-174. Indeed, opponents of the legislation voiced federalism concerns virtually identical to those voiced in Bryan County's brief: "It overrides the reserved powers of the States," and, it "absorb[s] the entire jurisdiction of the States over their local and domestic affairs." *Id.* at 174.

In essence, Bryan County's federalism concerns are more attributable to § 1983 itself than to the particular application of § 1983 to this case. Time and again, this Court has recognized the primacy of federal law in its § 1983 jurisprudence, even when doing so has authorized substantial federal

incursions into essentially state-oriented affairs. Relying on the Supremacy Clause, this Court unanimously ruled that state law immunities are not relevant in § 1983 litigation because they would frustrate the enforcement of federal law. *Howlett v. Rose*, 496 U.S. 356, 375 (1990). Additionally, although the "exhaustion of state remedies" doctrine rests primarily on federal-state comity concerns, this Court has effectively suspended that doctrine in the § 1983 context. *Monroe*, 365 U.S. at 183 (§ 1983 plaintiffs not required to exhaust state *judicial* remedies); *Patsy*, 457 U.S. at 516 (§ 1983 plaintiffs not required to exhaust state *administrative* remedies). This Court has even recognized that § 1983 authorizes federal "interference" with law suits being tried in state court. *Mitchum v. Foster*, 407 U.S. 225, 242 (1972) (federal courts may enjoin state court proceedings in § 1983 actions).

Each of the aforementioned cases involved federal-state comity concerns far more significant than a federal jury finding fault with a County Sheriff's hiring decision, despite its accidental bare-bones compliance with generic state law minimums.[11] Moreover, although we agree that § 1983 does not strip states of their authority to promulgate facially constitutional legislation, Jill Brown's lawsuit neither challenges nor frustrates Oklahoma's minimum officer qualifications. Indeed, unless Oklahoma state law *mandates* that all non-felon applicants be hired, in which case even a brief interview of that "qualified" applicant would seemingly frustrate state law, § 1983's application to deliberately indifferent municipal hiring decisions provides a *complement* to state law. And that, after all, was the primary purpose of § 1983 – to provide federal protection of constitutional rights in situations where state law, either in theory or in practice, does not do the trick. *Mitchum*, 407 U.S. at 242; *Monroe*, 365 U.S. at 173-74.

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[11] Given Sheriff Moore's assertion that he did not fully read his nephew's record due to its length, J.A. 115, and given his alleged unfamiliarity with the details of that record, *id.*, it is extremely disingenuous for Petitioner to argue that Sheriff Moore hired Burns in reliance on state laws that absolutely disqualified only felons. How could he have known that the record contained no felonies?

Bryan County's view of § 1983 would effectively "repeal" it. A state could protect its governmental subdivisions from § 1983 liability simply by passing easy-to-meet minimum standards at the state level that govern all the typical activities subdivisions perform. So long as the municipality formally met state law minimum requirements – *e.g.*, hiring a police officer with a high school diploma and no felony record – the governmental subdivision effectively would be insulated from § 1983 liability. A municipality literally could ignore an applicant's assertion during an interview that, "I want to be a police officer because I enjoy physical confrontations," or "I love gun play," or "I want to rough up some minorities," so long as the candidate met the state's generic minimum requirements. Yet, from the time of § 1983's enactment until today, it has been beyond dispute that *state* law minimums do not necessarily constitute sufficient protection of *federal constitutional* rights. Indeed, § 1983 was designed to address just such disparities. *Mitchum*, 407 U.S. at 242.

Recognizing that meeting state minimums does not insulate municipalities from § 1983 liability is not to say that compliance with those minimums is wholly irrelevant to *Canton*'s "deliberate indifference" standard. Yet, nowhere does Bryan County contend that it was somehow prevented from putting on evidence of those state law requirements or arguing to the jury that meeting those requirements demonstrated the absence of "deliberate indifference." Indeed, the record indicates otherwise. (*E.g.*, J.A. 49-50, 72-73). The jury's finding of deliberate indifference, however, indicates that the jury – as was its prerogative – was more influenced by the specific evidence surrounding Officer Burns' particular unfitness for the job of police officer, than by the County's evidence that hiring Burns was not expressly precluded by generic state law minimums.

Throughout its brief, Bryan County repeatedly mischaracterizes the Fifth Circuit's opinion, and thereby mischaracterizes the nature of the issue involved in this case. *See* P. Br., p.15 (accusing the Fifth Circuit of "craft[ing] a minimum hiring standard"); p.29 (implying that the Fifth Circuit

held that Burns' misdemeanors "precluded" his employment, thereby effectively permitting federal courts to "forbid" the hiring of any applicant with a misdemeanor record); p.31 (the Fifth Circuit "substituted its own minimum hiring standards"). An honest reading of the Fifth Circuit's opinion, however, reveals that it neither crafted minimum federal hiring standards nor held that municipalities are precluded from hiring officers with a misdemeanor record. The only "standards" applied by the Fifth Circuit were this Court's settled standards for § 1983 municipal liability; and all the Fifth Circuit "held" was that the evidence presented in this particular case was sufficient for a jury to conclude that Sheriff Moore's decision to hire Burns amounted to deliberate indifference to citizens' constitutional right to be free from excessive force. 67 F.3d at 1183-85. That holding is fact-specific, appropriately deferential to the jury's resolution of conflicting evidence, and in no way erects rigid federal qualifications for state officers that "forbid" or "preclude" the hiring of all officers who have committed misdemeanors.

Finally, Bryan County repeatedly cites three cases in support of its federalism argument, two of which have nothing to do with this case.[12] The third case is *City of Canton v.*

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[12] First, Bryan County relies heavily on *U.S. v. Lopez*, 115 S.Ct. 1624 (1995), surely destined to become the citation of choice for any situation where one's client simply doesn't like the implications of a federal law. The problem with applying *Lopez* to § 1983 is that *Lopez* involved a federal law passed pursuant to the Commerce Clause, *id.* at 1626, while the present case involves a federal law passed pursuant to Congress' Fourteenth Amendment power. That distinction has not gone unnoticed in recent federalism circles. *See Seminole Tribe of Florida v. Florida*, 116 S.Ct. 1114 (1996). Second, Bryan County relies on *Rizzo v. Goode*, 423 U.S. 362 (1976), where the Court held that a district court erred in granting an injunctive order directing the Philadelphia Police Commissioner to draft "a comprehensive program for dealing adequately with civilian complaints" to be formulated according to the district court's detailed "guidelines" for revising police manuals and rules of procedure. *Id.* at 369. Thus, *Rizzo* involves a district court's injunctive "takeover" of the internal operations of a city police department, readily distinguishable from a jury's imposition of compensatory damages based on a finding of municipal fault.

Harris, 489 U.S. 378, 392 (1989), which is cited, at p.15, for the proposition that imposing municipal liability based on police hiring decisions would "engage the federal courts in an endless exercise of second-guessing municipal [hiring] programs." But Petitioners have completely neglected to mention how *Canton* alleviated the problem of "endless federal court second-guessing" – *by requiring § 1983 plaintiffs to demonstrate municipal deliberate indifference*. And the federal district court in the present case required plaintiff to prove deliberate indifference in support of both her "bad hiring" and "bad training" claims.

II. MUNICIPAL FAULT UNDER § 1983 CAN BE BASED ON A SINGLE OFFICIAL MUNICIPAL DECISION, MADE BY A POLICYMAKER WITHIN HIS SPHERE OF POLICYMAKING AUTHORITY, SO LONG AS THAT MUNICIPAL DECISION IS DELIBERATELY INDIFFERENT TO CITIZENS' CONSTITUTIONAL NEEDS AND DIRECTLY CAUSES THE PARTICULAR CONSTITUTIONAL DEPRIVATION PORTENDED BY THE MUNICIPALITY'S DELIBERATE INDIFFERENCE.

When a non-policymaking municipal employee, such as a police officer, deprives a citizen of her constitutional rights and incurs § 1983 liability, that liability is not automatically imputed to the municipality via a theory of *respondeat superior*. *Monell*, 436 U.S. at 691. In other words, the employee's constitutional tort does not "belong" to the municipal employer simply because of the employer-employee relationship. Instead, a § 1983 plaintiff must clearly demonstrate *municipal* fault – *i.e.*, municipal responsibility for the constitutional tort committed by its employee. According to this Court's rulings in *Monell*, *Pembaur*, and *Canton*, municipal fault requires: 1) a municipal "policy," which means an official exercise of municipal power by the municipality, including an official decision by a municipal policymaker on a matter within his final policymaking authority; 2) that the municipality's exercise of official municipal power evince, under the circumstances, a deliberate indifference to citizens'

constitutional rights; and 3) a direct causal connection between the municipality's deliberately indifferent exercise of official municipal power and its employee's deprivation of plaintiff's constitutional rights. *See Monell*, 436 U.S. at 694; *Pembaur v. Cincinnati*, 475 U.S. 469, 480 (1986); *City of Canton v. Harris*, 489 U.S. 378, 388-391 (1989).

These three requirements are hardly mystical – they merely represent the three most basic requirements of either civil or criminal fault: 1) conduct, including an act or omission; 2) culpable mental state, and 3) proximate causation of the injury. The point of this Court's decisions in *Monell* and *Canton* was to assure that those three fundamentals of fault were actually attributable to the *municipality* and not simply thrust upon it due to the unexpected tortious conduct of an employee and the legal fiction of *respondeat superior*. Thus, *Monell*'s "policy" requirement effectively requires *municipal conduct – i.e.*, an official exercise of municipal power; *Canton*'s "deliberate indifference" standard is the requisite *municipal culpable mental state*; and *Canton*'s requirement of a close causal connection between the municipality's deliberate indifference and its employee's subsequent infliction of constitutional injury assures *municipal causation*. When these three aspects of municipal fault are established – municipal conduct, municipal culpable mental state, and municipal causation of the constitutional injury – it is appropriate for the municipality, and not just its employee, to shoulder the blame for the constitutional deprivation suffered by plaintiff. This Court's § 1983 jurisprudence requires plaintiffs to jump no additional hurdles. And to impose any further requirements would not only be arbitrary in light of centuries-old principles for attribution of fault, but would require a reading of *Monell* and *Canton* that is divorced from their primary source of legitimacy – *i.e.*, ensuring that § 1983 municipal liability is not based on *respondeat superior*.

This section of the Argument (II.), by demonstrating that plaintiff met existing Supreme Court requirements for § 1983 municipal liability – municipal "policy," municipal "deliberate indifference," and municipal "causation" of the constitutional injury – will reveal a case of *municipal* fault, where the

imposition of liability is consistent with *Monell* and *Canton* and does not rest on *respondeat superior*. Then, Part III of the Argument will demonstrate that a requirement that plaintiffs, as a matter of law, always show multiple incidents involving excessive force, even in cases where municipal fault is otherwise clearly established, amounts to nothing more than an arbitrary "every cop gets one free bite" rule.

A. Municipal "Policy" – Official Action by the Municipality Itself.

It is well settled that an isolated exercise of municipal power by a policymaking official acting within his sphere of policymaking authority can constitute *municipal* action that properly gives rise to § 1983 municipal liability. *Monell*, 436 U.S. at 694; *Pembaur*, 475 U.S. at 480-81. Therefore, Bryan County's suggestion that municipal liability for faulty hiring requires the plaintiff to show a consistent or widespread practice of faulty hiring is not only illogical (as it would require her to prove the faulty hiring of officers who had nothing to do with the deprivation of her constitutional rights), but rests on a view of *Monell*'s "policy" requirement that is completely divorced from its *Monell* foundations and, consequently, a view that was expressly rejected by this Court in *Pembaur*. 475 U.S. at 480-81.

Use of the term "policy," or "official policy," as a requirement for the imposition of municipal liability under § 1983 has its origins in *Monell*'s rejection of *respondeat superior*. 436 U.S. at 690-94. As the Court recognized later in *Pembaur*, its statement of the conclusion in *Monell* "juxtaposes the policy requirement with imposing liability on the basis of *respondeat superior*." 475 U.S. at 480 n.8 (*citing Monell*, 436 U.S. at 694). "Thus, [t]he 'official policy' requirement was intended to distinguish acts of the *municipality* from acts of *employees* of the municipality." *Pembaur*, at 479 (emphasis in original). The Court's ruling in *Monell* ensured that municipal liability is restricted to action for which the municipality is actually responsible. *Id.* at 479-80. In essence, the *Monell* requirement ensures that there will be

a municipal *actus reus*, so that municipal liability may only be predicated on acts that are acts "of the municipality" – *i.e.*, "acts which the municipality has officially sanctioned or ordered." *Id.* at 480. *See also Canton*, 489 U.S. at 394 (O'Connor, J., concurring in part) (emphasizing that municipal fault comes from "*the acts or omissions of the city itself*") (emphasis in original). Thus, the municipal "policy" requirement is significant precisely because, and only because, it ensures that municipalities are subject to liability only when an official exercise of municipal power, by the municipality, causes a deprivation of constitutional rights.[13] Nōt

[13] It should be evident from the context in which the term "policy" was employed in *Monell*, as well as the Court's interpretation of "policy" in *Pembaur*, that there is nothing magical about the term "policy." That term has no basis in statutory text, and this Court has thus far avoided interpreting it in such a way that it takes on a life of its own, cut loose from its "no *respondeat superior*" moorings in *Monell*. Indeed, the closest analogy to "policy" found in the statutory text is the requirement that persons act "under color of [state] law, statute, ordinance, regulation, custom, or usage." The Court in *Monell* expressly made this analogy when it recognized that the statutory language plainly imposes liability on a government [*i.e.* "person"] that "*under color of some official policy*," causes an employee to violate another's constitutional rights. 436 U.S., at 692 (emphasis added). This suggests that *Monell* saw the term "policy" as little more than the state (or local) power or authority that a § 1983 defendant must act "under color of." Of course, this Court has interpreted the "under color of state law" requirement to be virtually synonymous with the state action requirement. *Lugar v. Edmonson Oil Co.*, 457 U.S. 922, 929 (1982). But all official activity, whether performed by the municipality itself, or by its employees, is clothed in "state action." The key, then, to municipal liability under *Monell*, is *who* is acting under color of state law (the municipality itself? or, merely a municipal employee who has no authority to act *as* the municipality?), not whether that action can fit some made-up definition of "policy." In other words, it is the requirement of official action under color of state law *by the municipality itself* that avoids *respondeat superior*, and not whether that official action is an official municipal "policy," as opposed to an official municipal "act," official municipal "decision," official municipal "order," "ruling," "plan," "edict," "standard," etc. *See Monell*, at 690 ("decision") and 694 ("edicts or acts").

surprisingly, *Monell*'s municipal action requirement may take the form of a single municipal decision, made by a municipal policymaker, and tailored to a particular situation. *Pembaur*, at 480-81. The Court in *Pembaur* explained that there was no doubt that a municipality could be liable under § 1983 for a single decision by its legislative body. *Id.* at 480, *citing Owen v. City of Independence*, 445 U.S. 622 (1980); and *Newport v. Fact Concerts, Inc.*, 453 U.S. 247 (1981). And the Court in *Monell* expressly envisioned other *non-legislative* policymaking officials "whose acts or edicts may fairly be said to represent official policy." *Monell*, 436 U.S. at 694. Thus, no matter whether municipal policymaking authority rests with legislative officials, executive officials, or judicial officials, a single decision by the policymaker(s) ultimately in charge of that area of a municipality's affairs is an action properly attributable to the municipality itself under *Monell*.

Moreover, although "official policy" often refers to formal rules that establish fixed plans of action to be taken consistently and over time, the Court in *Pembaur* recognized that a government (or a governmental policymaker) frequently chooses a course of action tailored to a particular situation and not intended to control decisions in later situations. 475 U.S. at 481. According to the Court, "[i]f the decision to adopt that particular course of action is properly made by that government's authorized decisionmakers, it surely represents an act of official government 'policy' as that term is commonly understood." *Id.* Where such "decisions to adopt a particular course of action" are made by those who establish municipal policy, *Monell*'s requirement of municipal fault is satisfied because "the municipality is equally responsible whether that action is to be taken only once or to be taken repeatedly." *Id.* To deny compensation to the victim of such municipal fault would, according to *Pembaur*, be contrary to the fundamental purpose of § 1983. *Id.*[14]

[14] Even the dissenters in *Pembaur* did not quibble with the majority's conclusion that a single decision by a municipal policymaker within the scope of his policymaking authority may be an act that is sufficiently an act

The prevailing *Pembaur* view of *Monell*'s "policy" requirement makes good sense. It addresses the *Monell* concern about *respondeat superior* by ensuring the presence of a *municipal* act rather than basing municipal fault solely on the conduct of non-policymaking municipal employees. It properly recognizes that governmental power is not vested solely in legislative bodies, because § 1983 protects persons from deprivations of constitutional rights taken under color of state law, "whether that action be executive, legislative, or judicial." *Mitchum v. Foster*, 407 U.S. 225, 242 (1972). By equating municipal decisions designed to control common

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of the municipality to support municipal fault. The dissent, however, essentially believed that a County Prosecutor's five-word response to a single question over the phone lacked the dignity to be "official policy." 475 U.S. at 499 (Powell, J., dissenting). Although this may have read more into *Monell*'s use of the word "policy" than intended, it is certainly true that the Prosecutor's "go in and get them" response to the Deputy Sheriffs in *Pembaur* did not involve the deliberative process that typically characterizes an official municipal act, and was far short of the deliberative process normally employed by municipal policymakers when officially acting for the municipality (indeed, acting *as* the municipality) on matters such as hiring, firing, or training.

More importantly, the dissenters emphasized that the Prosecutor's "go in and get them," although authorizing the forcible entry that was at the heart of the *Pembaur* litigation, was advice that was consistent with federal constitutional law at the time. *Id.* at 492-96. The forcible entry was unconstitutional only in light of a subsequent Supreme Court holding that was retroactively applied to the § 1983 suit in *Pembaur*. *Id.* at 492-93. It is, therefore, difficult to fault the Prosecutor's advice. But it is important to remember that *Pembaur* was decided three years before *Canton* imposed its deliberate indifference requirement. It is unquestionable that the Prosecutor's "go in and get them" was not deliberately indifferent given the legal environment in which that decision was made. Thus, any harshness in the *Pembaur* result was attributable not to the absence of an official municipal *act* (or "policy"), but rather to the absence of any municipal *culpable mental state*. The Court avoided *respondeat superior*, but arguably imposed "strict liability" (liability in the absence of a culpable mental state). An application of *Canton*'s standard of mental culpability would ameliorate that problem.

recurring situations with municipal decisions choosing a one-time course of action tailored to a particular situation, *Pembaur* did no more than recognize that legislative power is occasionally tailored, executive power frequently tailored, and judicial power virtually always tailored, to situation-specific matters. The *Pembaur* view therefore treats municipal "persons" consistently with other § 1983 "persons," not only by rejecting *respondeat superior* and making liability "personal", but by imposing liability for one-time actions so long as those actions are under color of state law and subject another to (or cause another to be subjected to) a constitutional deprivation. And that is certainly consistent with common law tort principles that impose liability for a single wrongful act that causes harm, so long as that wrongful act is attributable to the person being sued.

In the present case, Bryan County's liability was premised not merely on Officer Burns' use of excessive force, but rather on deliberately indifferent *municipal* acts that directly caused Jill Brown to be subjected to a deprivation of her constitutional right to be free from such force. Because that deprivation of constitutional rights is fairly attributable to actions taken *by the municipality itself*, this case squarely involves an "official policy" as that term was used in *Monell* and *Pembaur*.

Bryan County stipulated at trial that Sheriff Moore was the County's policymaker on matters of hiring and training police officers. J.A. 30. The County now claims, *for the first time in any court*, that it never stipulated that Sheriff Moore was its "final" policymaker. P. Br., 19. This belated attempt to raise a dead issue depends on a revisionist view of the record. Not only did the County stipulate that "[a]t all times relevant hereto, Defendant [Sheriff] Moore was the policymaker for Bryan County regarding the Sheriff's Department," J.A. 30, the County additionally took the position that its Board of County Commissioners "did not participate in any policy decisions with regard to the conduct and operation of the office of the Bryan County Sheriff." J.A. 32. Thus, Sheriff Moore was not merely *a* policymaker, but *the* policymaker on matters of hiring and training officers. Moreover, the County

made no objection to the portion of the jury charge that stated, "Sheriff B.J. Moore is an official whose acts constitute final, official policy of Bryan County, Oklahoma." J.A. 122. The Fifth Circuit correctly found that Bryan County's failure to object to that portion of the jury charge waived the issue. 67 F.3d at 1182 n.17. Bryan County never raised this dead issue in its Petition for Writ of Certiorari, and it is simply too late now to breathe life into it. Thus, Sheriff Moore's hiring and training decisions were the *decisions of the municipality itself* on which municipal fault can properly be based. He *was* the County when acting in this area of County business. And *respondeat superior* ("let the master answer") is in no way implicated by imposing municipal liability based on wrongs perpetrated *by the master himself* in areas *within the master's domain.*

Bryan County nevertheless argues that Sheriff Moore's deliberate choice to employ one bad apple cannot be a "policy" absent a decision to employ other similarly bad apples. This argument not only contradicts *Pembaur*, it undercuts *Monell*'s holding that a municipality is a "person" subject to § 1983 liability so long as there is *municipal* fault. Under Bryan County's view, a municipality would have to be at least *twice* faulty before it could be regarded as liable. A municipal policymaker, as in this case, could deliberately pin a badge on a relative with a past history of violence and disregard for the law, authorize him to make forcible arrests prior to receiving any meaningful training, and avoid liability when that officer inevitably uses excessive force, so long as the municipality's deliberate indifference was restricted to one bad apple. A school district could deliberately employ a known pedophile to be an elementary school teacher and, so long as hiring pedophiles was not customary practice, avoid responsibility for the teacher's first (but highly foreseeable) sexual assault of a child. When such deliberately indifferent municipal actions subject citizens to a constitutional deprivation (indeed, the exact deprivation one would expect given the extreme risk consciously taken), there is clearly *municipal* fault. To nevertheless let the municipality off the hook would

undercut § 1983's primary purposes – deterrence of constitutional deprivations caused by those acting under color of state law, and compensation of the injured victims of those constitutional torts. Foreseeable constitutional torts that municipalities (or their policymakers) could readily avoid would go undeterred and uncompensated. Such bizarre results go far beyond *Monell*'s rejection of *respondeat superior* and, in effect, throw the "constitutional tort baby" out with the "*respondeat superior* bath water."

Not only would Bryan County's view create an arbitrary loophole to liability for some constitutional torts demonstrably attributable to *municipal* fault, but it flies in the face of centuries-old tort principles. This Court has emphasized that § 1983 creates a species of tort liability, *Carey v. Piphus*, 435 U.S. 247, 253 (1978), and often interprets § 1983 in light of those common law tort principles that governed suits against municipal corporations at the time of § 1983's passage. *See, e.g., Owen v. City of Independence*, 445 U.S. 622, 638-643 (1980). According to a leading nineteenth century treatise, "A municipal corporation is liable to the same extent as an individual for any act done by the express authority of the corporation, or a branch of its government, empowered to act for it upon the subject to which the particular act relates. . . ." T. Shearman & A. Redfield, *Negligence*, § 120, p. 139 (1869). Thus, municipal corporations were treated much like natural individuals, and liability could be based on a "particular act." Bryan County cannot point to a single principle of tort law that would let a culpable defendant – whether a natural individual or a corporate entity – set up a defense merely by pleading, "But my culpable injurious acts were a deviation from my typical behavior." "I drove 70 mph through a school zone with children present and killed one, but I don't usually drive 70 mph through there." "Our Board, despite its knowledge that unwitting workers would be exposed to dangerously high levels of radiation, authorized the plant to remain open, but it was a one-time deal."[15]

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[15] Of course, a municipal decision to pin a badge on a lawless individual is much less a "one-time deal" than the aforementioned illustrations, because the public danger will be ongoing and indefinite. In

This Court's opinion in *Canton* expressly envisions municipal liability based on one poorly trained employee, so long as that poor training is both the result of deliberate indifference and the cause of the constitutional deprivation. 489 U.S. at 387-391. When first characterizing the issue and its resolution, the Court recognized that there are "limited circumstances" where "the city is liable *if the employee has not been adequately trained* and the constitutional wrong has been caused by that failure to train. *Id.* at 387 (emphasis added). One of those limited circumstances is present where "a failure to train reflects a 'deliberate' or 'conscious' choice by a municipality – a 'policy' as defined by our prior cases," *id.* at 389, and that conscious choice is "deliberately indifferent" to citizens' constitutional rights. *Id.* In defining deliberate indifference, the Court explained, at 390 (emphasis added),

> it may happen that *in light of the duties assigned to specific officers or employees* the need for more or different training is so obvious, and the inadequacy so likely to result in the violation of constitutional rights, that the policymakers of the city can reasonably be said to have been deliberately indifferent to the need.

The Court, therefore, expressly recognized that the nature and degree of training required to avoid deliberate indifference may vary according to the particular duties of particular officers. Depending on whether the municipality is training an undercover officer, an investigator, a traffic officer, a jailer, or a new desk sergeant, meeting the need will require different types of training tailored to the officer's duties. And just as "adequate training" may vary according to

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other words, hiring a lawless individual has consequences not just on the day employment begins, but every day thereafter until employment is terminated. In any event, to require that a final policymaker's deliberate decision on an important matter within his sphere of authority must itself set down standard operating procedure, or create some ongoing condition, quite clearly overrules *Pembaur*'s common sense view of how official government power is exercised.

the specific duties of specific officers, so may it vary according to the specific characteristics of an officer. The nature and degree of training needed by a rookie cop might vary from that needed by a veteran who is simply switching duties. Even two rookie officers may have different needs depending on municipal awareness of background or personality traits (*e.g.*, hot-headedness, aggressiveness, timidity). Just like training, the adequacy of municipal decisions regarding employment status may depend on the particular officer as well as that officer's particular duties. Whether to hire, whether to terminate, whether to suspend, whether supervision is necessary and to what degree, whether a probationary period with limited duties is required, are necessarily case-specific determinations that simply exceed the reach of rigid formulas.[16]

Not only are case-specific decisions necessarily a prominent feature of a municipality's approach to hiring and training, but that is particularly true in small counties where there may be just a handful of officers, no two of which are similarly situated in terms of experience, duties, and behavior. County "policy" in such places will be exercised, virtually out of necessity, in a case-by-case fashion. Requiring anything akin to standard operating procedure in order to establish municipal fault is not only illogical given the inherent case-specific nature of many important municipal decisions, but it would effectively permit policymakers to conduct deliberately indifferent *ad hoc* experiments subjecting laboratory-rat-like citizens to the foreseeable shock of a constitutional deprivation. As long as no two experiments are the same, and each experiment is terminated after shocking its

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[16] Indeed, blind pursuit of some pre-set standard operating procedure when dealing with the myriad training and employment issues faced by municipal policymakers would inevitably result in decisionmaking that is either too general or too simplistic, and would surely constitute deliberate indifference in its own right. Thus, it is ironic that Bryan County so forcefully argued (and still argues) its adherence to state law minimum standards regarding hiring and training. This would seemingly concede the standard operating procedure that Bryan County claims is a necessary basis for municipal fault.

first victim, there can be no municipal liability under the view espoused by Bryan County.

On the other hand, liability for case-specific municipal exercises of power poses no threat of undeserved municipal liability. Municipalities are not responsible for a policymaker's decisions on matters that fall outside his policymaking authority. A Sheriff may be the "master" on matters central to law enforcement, but not the "master" regarding other exercises of discretion, such as the firing of a secretary, or budgetary decisions regarding the number of officers or the amount of sophisticated equipment the County can afford. The Sheriff's discretionary decisions on these latter matters, if truly outside the Sheriff's sphere of authority to act *as* the County, will not be attributable *to* the County. Moreover, the Sheriff's acts and omissions are not attributable to the County unless those acts or omissions reflect a conscious exercise of official municipal power. Thus, if the Sheriff decides to run a caution light at a dangerous intersection on his way to or from work, that decision is certainly not a *municipal* decision. Indeed, even when a final policymaker is unquestionably engaged in a conscious exercise of municipal power on a matter over which he is the municipality's "master," a case-specific decision will only be an adequate basis for municipal fault if the decision was deliberately indifferent under the circumstances and directly caused the constitutional deprivation. Thus, if the policymaker has done a generally adequate job (for example, in hiring or training), it will take more than an accidental or even negligent slip-up to create municipal fault. And even when there is municipal deliberate indifference, it will be exceedingly difficult to prove causation except in those rare circumstances, such as the present case, where the municipality is deliberately indifferent specifically in regard to the particular constitutional deprivation alleged.

B. Municipal Deliberate Indifference.

Canton's "deliberate indifference" standard is also a by-product of *Monell*'s rejection of *respondeat superior*. In virtually every case where a person's constitutional rights have

been violated by a municipal employee, a § 1983 plaintiff will be able to point to something that the municipality "could have done" to prevent the incident. *See Canton*, 489 U.S. at 392. If a plaintiff could recover from a municipality merely by showing that a police officer committed a constitutional tort that could have been avoided had the municipality imposed better training and supervision, such a lax standard of fault would practically resurrect the *respondeat superior* theory of liability rejected in *Monell*. *Id.* To avoid such *de facto respondeat superior*, the Court beefed up the municipal fault requirement in § 1983 "bad training" suits, holding that such claims yield municipal liability only when the municipality's failure to train reflects deliberate indifference to the constitutional rights of those persons with whom the police will come into contact. *Canton*, at 388, 392. The municipality's deliberate indifference, or the deliberate indifference of a municipal policymaker whose sphere of authority includes hiring and training certain municipal employees, ensures that shortcomings in hiring or training are sufficiently attributable to *municipal* culpability. *Id.* at 389. (Although *Canton* is a "bad training" case, its requirement that § 1983 plaintiffs prove municipal deliberate indifference in order to establish municipal fault logically applies to "bad hiring" cases.)[17] With respect to a failure to train, the Court in *Canton*

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[17] It could, however, be argued that "bad hiring" claims do not pose the same problems as "bad training" claims and, therefore, do *not* require a showing of deliberate indifference. A "bad training" claim can *always* be fashioned so as to create a direct causal connection between the alleged failure to adequately train (or adequately supervise) and the employee's deprivation of plaintiff's constitutional rights. (*E.g.*, "Your police officers did not recognize the difference between diabetic shock and drunkenness? You should have trained them specifically regarding those distinctions; therefore, the failure to do so proximately caused the deprivation of life.") It is that ease of manufacturing a direct causal connection between a municipal failure to train and an employee's subsequent deprivation that poses the threat of *de facto respondeat superior*. On the other hand, it is very difficult to fashion a bad hiring claim so as to create that direct causal connection; "but for cause" will usually be present in a bad hiring claim,

explained that its standard is met when "the need for more or different training is so obvious, and the inadequacy so likely to result in the violation of constitutional rights, that the policymakers of the city can reasonably be said to have been deliberately indifferent to the need." *Id.* at 390. That is precisely the degree of municipal fault that the District Court required Jill Brown to prove in support of both her "bad hiring" and "bad training" theories of § 1983 municipal liability, J.A. 123; and she met those heightened proof requirements, winning the jury verdict on both theories. J.A. 135.

Bryan County's argument that *Canton* requires plaintiffs to demonstrate "to a moral certainty" that the municipal actions complained of would lead to a constitutional deprivation is very misleading. First, a "certainty" that a deprivation will occur is arguably a higher standard than "deliberate indifference" to the constitutional rights of citizens with whom the officer will come into contact.[18] Second, the discussion in which the Court talks about "moral certainty"

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but proximate cause will exist only in those rare cases, like the present one, where the municipality has pre-employment notice of some specific tendency to commit a particular deprivation, and it is that particular deprivation that occurs. (*E.g.*, note the absurdity of arguing, in the above parenthetical illustration, "You should have hired only those officers who are able to recognize the difference between diabetic shock and drunkenness.").

[18] While "deliberate indifference" is a classic statement of recklessness, "certainty" would virtually require a plaintiff to demonstrate that a municipality *intended* by its official municipal actions to cause constitutional deprivations. That would have been quite an overreaction to the *Canton* concern that "failure to train" claims, unless accompanied by proof of a culpable municipal mental state, could result in *de facto respondeat superior*.

Even if "deliberate indifference" and "moral certainty" somehow describe the same standard, the judge's instructions required the jury to find "deliberate indifference" as defined in *Canton*'s text. J.A. 123. Only if the Supreme Court was faking everybody out with its repeated references to "deliberate indifference," and hiding the real standard ("moral certainty") in a footnote, does Bryan County's argument have any weight.

reveals that the present case involves the very "certainty" the Court was talking about. *See* 489 U.S. at 390 n.10. According to the Court, because policymakers "know to a moral certainty that police officers will have to make judgments about using force, the need to train is "so obvious" that failure to do so can constitute "deliberate indifference" to citizens' constitutional rights. *Id.* Indeed, the Court used this illustration to demonstrate when a municipality has notice of the public's constitutional needs even *prior to* a pattern of constitutional deprivations. *Id.* This "moral certainty" that police will have to make judgments about the use of force in recurring situations is just as "certain" at the time municipal policymakers are hiring officers as when they are training (or not training) them. Therefore, hiring in disregard of that "moral certainty" is surely as "deliberately indifferent" to citizens' constitutional rights as a failure to train for those situations. In any event, Jill Brown proved that Bryan County's final policymaker on matters of hiring and training police officers was deliberately indifferent in *both* respects – his decision to hire Burns despite a lengthy record revealing a general disregard for law and order; and his decision to authorize Burns to make forcible arrests prior to receiving any meaningful training.

Finally, Bryan County argues that the municipality cannot be deliberately indifferent regarding its official hiring and training decisions regarding one officer. But, as previously shown, *Canton* expressly envisioned municipal liability based on the inadequate training of specific officers. Indeed, by giving examples of when the unsatisfactory training of a particular officer will *not* suffice to impose liability on a municipality, 489 U.S. at 390-91, the Court implicitly demonstrated when the unsatisfactory training (or hiring) of a particular officer *will* suffice. According to *Canton*, if a poorly trained officer accidentally or negligently slips through the cracks of a sound training program, the requisite municipal fault (deliberate indifference) is not present. *Id.* Additionally, even when more or better training of the officer would have avoided the injury, if his training was nevertheless adequate to enable him "to respond properly to the usual and recurring situations with which officers must deal," *id.* at 391, then,

once again, there is clearly no municipal deliberate indifference. And even if an officer is inadequately trained, the injury may not have been avoidable even with good training,[19] or may not be "closely related to" the training deficiency. *Id.* Not only are these illustrations cast in terms of a singular officer or employee, but they describe situations patently *unlike* the present case. By proving that Bryan County's decision to hire Burns, and its subsequent decision to authorize Burns to make forcible arrests with virtually no training, were *deliberately indifferent* to the constitutional duties faced by police officers in recurring situations, Jill Brown plainly demonstrated that Burns did not merely "accidentally or negligently" slip through the cracks of "adequate" County hiring and training decisions. The deliberate indifference, of course, shows less than "adequacy" and more than "negligence." Nor is this a case where the hiring and training was less than perfect but nevertheless adequate to enable a proper response "to the usual and recurring situations with which officers must deal." And finally, the next section (II.C.) will demonstrate that the constitutional deprivations suffered by Jill Brown were "closely related to" the identified hiring and training inadequacies. Therefore, this is precisely the type of case where *Canton* envisioned municipal liability for constitutional deprivations caused by the deliberately indifferent municipal training (or hiring) of a particular officer.

C. Municipal Causation.

To establish municipal liability, § 1983 plaintiffs must, of course, demonstrate that the constitutional deprivation suffered was *caused by* the municipality's deliberately indifferent official municipal acts or omissions. *Canton*, at 391. In explaining this causation requirement, this Court stated that the identified municipal deficiency must be "closely related to

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[19] Given the deliberately indifferent municipal decision to hire Burns, it certainly would have done Bryan County little good to argue that Burns was so prone to violence that even good training could not have avoided his use of excessive force on Jill Brown.

the injury," "actually cause" the injury, or be the "moving force behind the constitutional violation." *Id.* at 389, 391. *See also Oklahoma City v. Tuttle*, 471 U.S. 808, 823 (1985) ("affirmative link"). Plainly, regardless of choice of terminology, "closely related to," "moving force," and "affirmative link" are all references to the traditional tort standard of proximate cause. Because § 1983 was intended to create a species of tort liability, *Carey v. Piphus*, 435 U.S. 247, 253 (1978), this Court has emphasized that § 1983 "should be read against the background of tort liability that makes [defendants] responsible for the natural consequences of [their] actions." *Monroe v. Pape*, 365 U.S. at 187. At the time of Congress' passage of the Civil Rights Act of 1871, the practical construction of "proximate cause" by the courts was "a cause from which a man of ordinary experience and sagacity could foresee that the result might probably ensue." T. Shearman & A. Redfield, *Negligence*, § 10, p.11 (2d Ed. 1870).

The present case does not present difficult causation issues. As the Fifth Circuit ruled, there was sufficient evidence in support of the jury finding that the municipal policymaker's deliberately indifferent decisions directly caused the deprivation of Jill Brown's constitutional rights. 67 F.3d at 1185. A Sheriff (the official County policymaker on matters of hiring and training police officers) decides to hire a relative with a lengthy criminal record, and admits that he neither read the record carefully ("it was real long"), nor made any further inquiry; he gives this "lawless" individual a badge, and authorizes him to make forcible arrests prior to receiving any formal departmental training or any other meaningful training. Whether this Court's description of causation in *Canton* refers to "proximate cause" or some previously unknown version of causation that would uniquely apply to municipal liability under § 1983, it is sheer torture of the English language to argue that the wrongly employed and poorly trained officer's use of excessive force against Jill Brown was somehow not "closely related to," "directly caused by," "affirmatively linked to," a "foreseeable result of", or a "natural consequence of" the policymaker's deliberately indifferent wrongs.

This is plainly a case where the County's deliberately indifferent exercises of official County power were the "moving force" of the constitutional deprivations. Indeed, the extreme risk that an applicant with a lengthy record of lawlessness will use excessive force against a citizen was precisely the risk that made the County's decision to hire him "deliberately indifferent" to the constitutional rights of those citizens with whom the officer would come into contact. This is not a case where the municipality hired an individual with a propensity toward violence who unforeseeably enforced the law in a racially discriminatory manner. Nor is this a case of employing a former member of the KKK who unforeseeably molests a juvenile detainee. Nor is this a case of employing someone with a history of sexual assaults who, upon being delegated the discretion to hire and fire, unforeseeably fires someone based on protected First Amendment activity. Rather, this is a case where the constitutional deprivation perpetrated by the municipal employee is precisely the deprivation most highly risked by the municipality's deliberate indifference.

III. PROVING MULTIPLE INCIDENTS OF EXCESSIVE POLICE FORCE IS NOT AN ELEMENT – MUCH LESS AN INDISPENSABLE ELEMENT – OF MUNICIPAL FAULT.

A victim of excessive police force who has vividly demonstrated that her constitutional injury proximately resulted from a deliberately indifferent exercise of official municipal power should not, *additionally*, have to demonstrate that other persons not party to her lawsuit have suffered similar past deprivations. Such a requirement would be wholly arbitrary, and contribute not one iota to plaintiff's demonstration of municipal fault. This is not a case where a police officer's propensity for employing excessive force came to the attention of municipal policymakers only after his first use of excessive force. In such a case, the municipality would have no "notice" of that officer's propensity until after that first incident. Consequently, there would be no municipal duty to

terminate employment, to suspend and/or rehabilitate the officer, or to provide further training and supervision tailored to the particular officer's problem. And in the absence of notice triggering such a municipal duty, the "first victim" could not successfully argue that the municipality's failure to take remedial steps was a conscious municipal decision or "policy," much less that the municipal omission was deliberately indifferent to the need, *or* that the municipal inaction was the proximate cause of the constitutional injury (given the officer's unforeseeable intervening use of excessive force).

But in a case like the present one, where the municipality had notice of the officer's character deficiency *prior to employment*, and where that character deficiency (propensity toward violence and general disregard for the law) is one that especially portends a likely use of excessive force (the classic product of a police officer's violent or lawless disregard for another's legal rights), then both the municipal obligation and the public need are obvious long before the officer unconstitutionally injures his first victim. No matter whether the municipality's "notice" comes from pre-employment behavior, post-employment off-duty behavior, or a post-employment deprivation, the municipality's obligation to take corrective measures surely must arise at the time it is put on notice. Certainly not *before*, but certainly not at some arbitrary *later* time.

A "multiple incidents" requirement is not only wholly unnecessary to establish municipal fault in cases such as Jill Brown's, it sorely lacks even the barest legal foundation. It would blatantly rewrite § 1983's express language, effect a sea-change in the substantive definition of a constitutional tort, and contradict a wealth of Supreme Court precedent.

A. The Language of § 1983 Plainly Imposes Liability for Causing a Single Deprivation.

Bryan County's suggestion that victims of constitutional torts must demonstrate multiple incidents of similar deprivations in order to recover from a municipality flies directly in the face of § 1983's plain language, and would effectively

rewrite the statute to impose different requirements for suing a municipality-"person" and suing other "persons." As previously noted, one of the purposes of *Monell*'s rejection of *respondeat superior* was to treat municipal-"persons" the same as other "persons," who must *themselves*, under color of state law, subject others (or cause others to be subjected) to a constitutional deprivation. *Monell*, 436 U.S. at 691-92. Nothing in *Monell*, and nothing in the language, purposes, or legislative history of § 1983 supports according municipality-"persons" a preferred position over other "persons" defending § 1983 suits. And it is beyond dispute that natural "persons," such as Officer Burns, need only cause a single deprivation in order to incur liability.

The legislative history of § 1983 indicates that Congress specifically intended a liberal and beneficent construction of § 1983. *Monell*, at 684.[20] Not that a liberal construction is necessary, because the language of § 1983 is plain – it authorizes recovery for a "deprivation" (singular). 42 U.S.C. § 1983. And a municipality bears fault for that singular deprivation so long as the plaintiff can establish *municipal* action (under *Monell* and *Pembaur*), *municipal* deliberate indifference (under *Canton*), and *municipal* causation (also under *Canton*). To impose any additional requirement – such

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[20] Representative Shellabarger, the first Congressman to explain the function of § 1 of the Civil Rights Act, described how the courts should interpret it:

> This act is remedial, and in aid of the preservation of human liberty and human rights. All statutes and constitutional provisions authorizing such statutes are liberally and beneficently construed. It would be most strange and, in civilized law, monstrous were this not the rule of interpretation. As has been again and again decided by your own Supreme Court of the United States, and everywhere else there is wise judicial interpretation, the largest latitude consistent with the words employed is uniformly given in construing such statutes and constitutional provisions as are meant to protect and defend and give remedies for their wrongs to all the people.

Cong. Globe, 42d Cong. 1st Sess., App. 68 (1871).

as multiple incidents of similar deprivations – would engraft an artificial and extra-statutory barrier to municipal liability on top of the already imposing barriers erected in *Monell* and *Canton* to protect municipalities from undeserved liability.

The language in the controlling § 1983 municipal liability cases, like the statutory language, expressly envisions municipal liability – so long as municipal fault is established in accordance with *Monell* and *Canton* – for a single constitutional violation perpetrated by one of its employees. *See, e.g.*, *Monell*, 436 U.S. at 694 (municipality is responsible when it "inflicts *the injury*" or is "the moving force of *the constitutional violation*." (emphasis added); *Canton* at 389 ("*the constitutional violation*" and "*a constitutional deprivation*"), and at 391 (deficiency in training must "be closely related to *the ultimate injury*") (emphasis added); *Oklahoma City v. Tuttle*, 471 U.S. 808, 823 ("there must be an affirmative link between the policy and *the particular violation* alleged") and at 824 ("*the incident*," "*the constitutional deprivation*") (emphasis added).

All of the preceding references in the singular to "incident," "violation," "deprivation," and "injury" are surely not an accident. As noted previously, there may be cases where multiple incidents involving a particular deprivation are necessary to trigger the municipal notice that creates a municipal obligation to take remedial action, such that the failure to do so constitutes deliberate indifference, foreseeably resulting in a later actionable similar deprivation. And, of course, where there is no affirmative exercise of municipal power – no conscious, deliberate municipal decision to take some action or not take some action – a plaintiff's theory of liability will normally be based on a municipal "custom" of tolerating constitutional deprivations or, at least, acquiescing in a catalytic environment conducive to constitutional deprivations. Such a theory will, of course, require proof of widespread practices or multiple incidents of constitutional deprivations. Nevertheless, that *some* theories of municipal fault in *some* cases will require proof of multiple incidents hardly supports a conclusion that plaintiffs must, as a matter of law, *always* prove prior incidents of excessive force in order to establish

municipal liability.[21] Indeed, such a "multiple incidents" requirement would undermine § 1983's goal of deterring avoidable injury-producing municipal deliberate indifference, and ensure that many deserving plaintiffs go uncompensated, even when they can readily demonstrate municipal fault without pointing to "multiple incidents."

B. A Requirement That § 1983 Plaintiffs Always Prove "Multiple Incidents" Would Change the Substantive Definition of a Constitutional Tort.

This Court has often emphasized that Congress intended § 1983 to create a species of tort liability. *E.g.*, *Carey v. Piphus*, 435 U.S. 247, 253 (1978). Therefore, § 1983 should be interpreted against the background of tort liability, *Monroe v. Pape*, 365 U.S. 167, 187 (1961), and in harmony with general tort defenses. *Imbler v. Pachtman*, 424 U.S. 409, 418 (1976). Thus, in *Owen v. City of Independence*, 445 U.S. 622, 638-643 (1980), the Court denied municipalities qualified immunity based on the good faith of their agents after determining that such a defense was unavailable at common law in damage suits against municipal corporations.

Just as the Court in *Owen* "searche[d] in vain" for mention of municipal qualified immunity, *id.* at 641, so would the Court today search in vain for a common law tort principle – whether the defendant is a natural person, a private corporation, or a municipal corporation – that requires, as a matter of

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[21] An absolute requirement of "multiple" incidents also contravenes the settled *Monell-Pembaur* doctrine that official municipal action – even if not "customary" – will support municipal fault. Quite clearly, an official municipal decision tailored to a specific matter may proximately cause a non-"customary" constitutional tort. If that official municipal action was executed with deliberate indifference and proximately caused a constitutional deprivation, there is obviously municipal fault under *Canton*. To require that the constitutional deprivation itself be "customary" would take a type of municipal fault that *Monell*, *Pembaur*, and *Canton* welcomed into § 1983's front door, and kick it out the back.

law, that plaintiffs prove prior similar defendant-caused injuries suffered by other individuals. Indeed, the primary purpose of tort law is to compensate the victim of a civil wrong for the damage suffered, at the expense of the wrongdoer. Prosser & Keeton, *Torts* § 2, p.7 (5th ed. 1984). Given that essential underlying policy of tort law, it is hardly surprising that no case or principle can be found requiring wrongly injured plaintiffs to establish additional injuries, at other times, in other places, to other persons.[22] A victim of a reckless driver may recover for her injuries without pointing to other victims of defendant's prior reckless driving incidents. A victim of an explosion caused by reckless corporate activity, such as a Board of Directors' decision to keep a plant open despite knowledge of a dangerous gas leak, need not prove that there have been other victims of other explosions caused by other gas leaks consciously ignored by other reckless Board decisions.[23] Similarly, victims of municipal deliberate indifference should not have to uncover other prior victims of municipal deliberate indifference.

The common law doctrine most resembling Bryan County's "multiple incidents" argument is the archaic "every dog gets one free bite." Of course, in the present case, Bryan County was not dealing with a police dog, but a human being who had done a sufficient amount of living to accumulate a track record (indeed, a lengthy one) of aggressive and lawless behavior. Even with dogs at common law, there was an exception to the "one-bite" rule when the owner had knowledge of a dangerous propensity unique to that particular animal. *See, e.g.*, *Rider v. White*, 65 N.Y. 54 (1875); *Van Leuven v. Lyke*, 1 N.Y. 515 (Ct. App. N.Y. 1848). And by the time Congress passed the Civil Rights Act of 1871, it was settled that acts of aggression brought to the notice of the owner need not be

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[22] It is also not surprising that plaintiffs have never been legally required to establish two *wrongs*, or a pattern, series, or standard practice of, similar wrongs. *See* II.A. of Argument.

[23] Nor could the Board successfully argue lack of notice prior to the first explosion.

precisely similar to that which was the basis of the suit; rather, it was necessary only that the facts brought to the owner's notice "should indicate a disposition to commit injuries substantially like those which form the basis of the claim against the owner." T. Shearman & A. Redfield, *Negligence*, § 190, p.231 (2d Ed. 1870).[24] Indeed, corporations that kept dogs were equally chargeable with notice of vicious propensity as an individual. *Barrett v. Malden R. Co.*, 3 Allen, 101. In the present case, the municipality had notice of the very character deficiencies (aggressive behavior, general disregard for the law) that are particularly predictive of excessive force. That notice of such character deficiencies occurred *pre*-employment gave the municipality the advantage of an option – superior to training and supervision – that would have eliminated the known public risk: "Don't give him a badge!" But even given the decision to employ him, the municipality's deliberate indifference was magnified by its failure to provide or require any meaningful training prior to setting him loose on the public authorized to make forcible arrests. It is as if an individual purchased a full grown dog, aware of its aggressive past behavior and the lack of success of prior efforts at rehabilitation, and then, instead of keeping that dog on a short leash during a probationary period involving close supervision until the successful *completion* of obedience school, set that dog loose upon the public, specifically authorizing public contact. When that dog subsequently attacks and severely

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[24] The most probable reason that a formal "one-bite" rule gave way to a less arbitrary "knowledge of propensities" view is the amount of court time spent arguing over what constituted a prior similar bite. Is biting another animal like biting a person? Is biting cows like biting sheep? *See Mason v. Keeling* (12 Modern 332) (1700) (Gould, J.). Thus, the arbitrariness of an "every 'law dog' gets one bite" rule would hardly be offset by ease of application. One can foresee municipalities creatively searching for distinctions of previous officer "bites." Is using excessive force against an uncooperative arrestee sufficiently like an unprovoked use of excessive force against a drunken, yet cooperative, driver? Is the use of excessive force in a high stress drug raid sufficiently like a use of excessive force during a white collar fraud sting operation?

injures a person, it is hardly surprising that the body of tort law – whether in this century or the last – provides no defense for the owner to claim, "But it was the only bad dog in my whole pack," or, "But it was the first bad incident since I bought him." Neither should this Court reshape the definition of § 1983's constitutional tort to give municipalities a similarly arbitrary defense.

This Court, in both *Monell* and *Owen*, relied heavily on common law in deciding to treat municipal corporations like private corporations and natural persons. *Monell*, at 687 ("by 1871, it was well understood that corporations should be treated as natural persons for virtually all purposes of constitutional and statutory analysis"); *Owen*, at 640 ("as a general rule, it was understood that a municipality's tort liability in damages was identical to that of private corporations and individuals"). Just as private corporations and natural persons have never enjoyed a "single incident" defense, neither have municipal corporations, as implicitly evidenced by a leading nineteenth century treatise: "A municipal corporation is liable to the same extent as an individual *for any act done* by the express authority of the corporation, or of a branch of its government, empowered to act for it upon the subject to which the particular act relates. . . . " T. Shearman & A. Redfield, *Negligence* § 120, p.139 (1869) (emphasis added). A review of nineteenth century cases will show no dearth of municipal liability based on one-time wrongs. *See, e.g.*, *Thayer v. Boston*, 19 Pickering 511, 31 Am. Dec. 157 (Mass. 1837) (tort action against municipality based on unique injury caused by one obstruction of one passageway in front of one warehouse); *Chicago v. Robbins*, 2 Black 418, 17 L.Ed. 298 (1863) (city liable for one injury to one person who fell one time into one hole in one sidewalk).

C. This Court's Precedent Demonstrates That Proof of Prior Similar Deprivations Is Not An Absolute Requirement of § 1983 Municipal Liability.

In *City of Canton v. Harris*, this Court ruled that a municipality's failure to train represents "city policy" when

"in light of the duties assigned to specific officers or employees the need for more or different training is so obvious, and the inadequacy so likely to result in the violation of constitutional rights, that the policymakers of the city can reasonably be said to have been deliberately indifferent to the need." 489 U.S. at 390. In explanation of how that standard might be met, the Court contrasted a scenario of municipal inaction in light of repeated police deprivations of constitutional rights (*i.e.*, "multiple incidents") with a scenario where, even before incidents of unconstitutionality, policymakers "know to a moral certainty" that their police officers will confront certain recurring law enforcement situations, such as making forcible arrests. *Id.* at 390 n.10; *see also* 489 U.S. at 396 (O'Connor, J., concurring in part). With respect to using force, the need to train "can be said to be 'so obvious' that failure to do so could properly be characterized as 'deliberate indifference' to constitutional rights." 489 U.S. at 390 n.10. Thus, the Court's analysis in *Canton* effectively distinguished between a failure to train police officers to recognize some particular medical ailment and the failure to train police regarding the use of force. While notice of a need to train (in order to avoid constitutional deprivations) may be absent in the medical case prior to an incident where that medical ailment went undetected, a municipality can hardly complain that it lacked notice that police would confront situations requiring them to determine whether to use force, how much force to apply, and how to apply that force so as to avoid unnecessary infliction of serious injury.

The analysis in *Canton* clearly supports municipal liability in the present case – expressly so on the "bad training" claim, not only because it was "obvious" to the municipal policymaker that Officer Burns would be making forcible arrests, J.A. 96, but additionally because of the municipality's notice that Burns was prone to aggressive and lawless behavior. But *Canton*'s reasoning also applies to a "bad hiring" or "bad personnel decision" claim; at the time of the employment decision, municipal policymakers also have notice of those recurring situations that police officers will obviously confront, such as choices regarding the use of force. To hire

in disregard of those clear constitutional duties that police will face in recurrent situations is as "deliberately indifferent" to the rights of those citizens with whom police will come into contact as any subsequent failure to adequately train them in the exercise of those duties. And, just as *Canton* acknowledged that deliberate indifference to such obviously recurring constitutional duties may be established prior to any unconstitutional incidents in "bad training" cases, the same has to be true in "bad hiring" cases. Any distinction between the two would have some bizarre consequences. For one, such a distinction would create a preference for municipal *omission* cases (deliberately indifferent failure to train) over municipal *commission* cases (deliberately indifferent decision to employ). Secondly, such a distinction would create a preference for cases based on *indirect evidence* of deliberate indifference (based on a failure to respond to prior unconstitutional incidents) over cases based on *direct evidence* of deliberate indifference (the Sheriff's deliberate closing of his eyes to his relative-applicant's lengthy criminal history).

Although *Canton* is most closely on point, this Court has never seriously questioned the proposition that one constitutional deprivation is enough. Thus, this Court has envisioned municipal liability for a single deprivation in those cases where a municipality has directly authorized the deprivation. *See, e.g., Owen v. City of Independence*, 445 U.S. 622 (1980) (City Council's case-specific one-time discharge of one Police Chief without a hearing); *Pembaur v. Cincinnati*, 475 U.S. 469 (1986) (County policymaker's case-specific "go in and get them," resulting in one unconstitutional warrantless entry of one barred door with one axe). And while those cases involved direct municipal authorizations of constitutional deprivations, *Canton* forecloses any distinction between those municipal actions which themselves violate constitutional rights and those municipal actions that, through deliberate indifference, directly result in an employee's subsequent violation of constitutional rights. 489 U.S. at 386-87. Indeed, the language of § 1983 simply permits no distinction to be drawn between direct municipal authorization of unconstitutional activity and deliberately indifferent official municipal actions

that "subject [persons] or cause [them] to be subjected" to a constitutional deprivation.

A single deprivation has always been enough to support § 1983 recovery against natural "persons" as well. *See, e.g., Estelle v. Gamble*, 429 U.S. 97 (1976) (case-specific medical mistreatment by prison personnel of one prisoner with one back injury); *Monroe v. Pape*, 365 U.S. 167 (1961) (police officers' case-specific breaking into one family's home on one early morning occasion, making plaintiffs stand naked in one living room during one ransacking of house). Single incidents have been sufficient even in cases involving private natural "persons." *See, e.g., West v. Atkins*, 487 U.S. 42 (1988) (private doctor deliberately indifferent to one prisoner's medical needs based on mistreatment of one once-torn Achilles tendon). And any distinction between natural "persons" and municipal corporation "persons" has no basis in § 1983's statutory text, and contradicts this Court's recognition that common law at the time of § 1983's passage treated municipal corporations just like private corporations and natural persons. *Monell*, 436 U.S. at 687; *Owen*, 445 U.S. at 640.

Despite all the preceding (and overwhelming) evidence that § 1983 does not have a multiple unconstitutional incident requirement, Petitioner relies, at P. Br. 24, on a solitary phrase in *Oklahoma City v. Tuttle* taken wholly out of context. In *Tuttle*, the trial judge's instructions to the jury permitted a finding of municipal liability without any substantial proof of municipal fault. 471 U.S. at 821, 824. Those instructions required proof *only* of the constitutional deprivation (excessive force by a police officer) and permitted the jury to infer from that single incident of excessive force all the elements of municipal liability – 1) the "policy," such as a decision by a policymaker in charge of police training, 2) the "deliberate indifference" by that policymaker in choosing an inadequate course of action in training matters, and 3) the direct causal connection between the deliberately indifferent municipal decision and the municipal employee's constitutional tort. 471 U.S. at 821. If a plaintiff could recover from a municipality merely by introducing proof of an employee's constitutional violation, without more, and have a jury instructed that it

could infer each of the elements of *municipal* liability solely based on evidence of the municipal employee's constitutional tort, the efforts of the Court in *Monell* (and later in *Canton*) – to set standards for municipal liability that ensure *municipal* fault and not just municipal *employee* fault – would have been in vain. Indeed, if municipal liability could be based *solely* on proof of a single incident of excessive force perpetrated by a municipal employee, *without more* – *without* proof of any official action taken by a municipal policymaker, *without* proof of that policymaker's deliberate indifference, and *without* proof that the policymaker's deliberate indifference caused the constitutional deprivation – municipal liability would be based on *respondeat superior*, which the Court in *Monell* expressly rejected. Thus, the Court in *Tuttle* was simply ensuring the continued vitality of *Monell*; the Court in no way ruled, or even implied, that § 1983 plaintiffs must, as a matter of law, prove *multiple* incidents involving constitutional violations in order to recover from a municipality. Indeed, the Court in *Tuttle* expressly approved of municipal liability based on a single incident of unconstitutional activity, *if* proof of the single incident is accompanied by proof of the requisite fault on the part of the municipality, and proof of the causal connection between the municipal fault and the constitutional deprivation. *Tuttle*, at 824. In sum, the "single incident" phrase in *Tuttle* simply does not bear the load that Petitioner attempts to place on it. And, unlike *Tuttle*, the judge's instructions in the present case clearly did not permit the jury to infer the existence of all of the elements of municipal liability (or *any* of those elements) solely from the incident involving Burns' excessive force against Jill Brown. J.A. 122-23. Rather, Jill Brown was required to prove – and did prove – that deliberately indifferent official municipal decisions directly caused her to suffer excessive force and other constitutional deprivations at the hands of Officer Burns. That is precisely the showing of municipal fault required by *Monell* and *Canton*.

IV. IN LIGHT OF THE EXISTING BARRIERS TO ESTABLISHING MUNICIPAL FAULT UNDER § 1983, MUNICIPALITIES HARDLY NEED THE BENEFIT OF THE ARBITRARY DOCTRINE(S) AT ISSUE IN ORDER TO AVOID UNDESERVED LIABILITY.

Wrong is wrong. Unless, it is argued, the wrongdoer is a municipality. Then, according to Bryan County's view, it takes at least two wrongs to make a wrong. A municipality must be *twice* faulty, such as by hiring two known bad apples, in double deliberate indifference to citizens' constitutional rights, setting both of those bad apples loose on the public, authorizing both to make forcible arrests prior to meaningful training (a second dose of double deliberate indifference), thereby subjecting citizens to subsequent deprivations on at least two separate occasions. This proposed "one wrong is not enough" doctrine is not only contrary to those notions of fault instilled in us as preschoolers,[25] this brief has demonstrated that it is contrary to the express language of § 1983, to its underlying purposes, to long-settled tort principles of responsibility which form the backdrop of § 1983's constitutional tort, and to this Court's holdings *and* rationales in *Monell*, *Pembaur*, and *Canton*. Moreover, the proposed "one municipal constitutional tort is not enough" rule would treat municipal-"persons" differently than natural "persons," contrary to both good common sense and good legal sense, and would have other bizarre results. Bryan County's view literally would permit municipalities knowingly to put "time bombs" on our streets and in our schools, and then deny to the victims of the first post-employment explosions of those "bombs" the opportunity for § 1983 recovery from the municipality, even though the municipality might be the only possible source of compensation and even though the municipality is demonstrably at fault.

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[25] How many of us, when our parents said, "Don't," tried to do what was forbidden just once, and were punished for our efforts?

And *why*? Municipalities simply do not need this type of arbitrary barrier to § 1983 liability. The sensible barriers to undeserved municipal liability already imposed by *Monell* and *Canton* are high indeed. *Monell* ensures that municipal liability truly will be based on *municipal* fault, and not merely upon *respondeat superior*'s automatic attribution to the municipality of employee-perpetrated constitutional deprivations. 436 U.S. at 691. Although *Pembaur* recognizes that the power to act for and bind the municipality may be vested in certain individuals as well as boards, and that municipal power may be exercised in a case-specific fashion, 475 U.S. at 480-81, *Pembaur* and its progeny ensure that municipal liability may be based only on official municipal exercises of power by the official(s) whose sphere of ultimate authority includes that aspect of municipal business which is at the heart of the litigation. *Pembaur*, 475 U.S. at 481-83 (plurality); *City of St. Louis v. Praprotnik*, 485 U.S. 112, 123 (1988) (plurality).[26] Furthermore, *Canton*'s deliberate indifference standard ensures that municipal fault cannot be based on a poorly trained employee who accidentally or negligently slips through the cracks of generally adequate municipal decisionmaking. 489 U.S. at 390-91. Applying that deliberate indifference standard ensures that municipalities will be no more vulnerable to undeserved liability in "bad hiring" cases than in "bad training" cases, and also alleviates any federalism concerns about federal court second-guessing of municipal training or hiring. *Id.* at 392. Finally, *Canton*'s causation requirement ensures that even a deliberately indifferent municipal exercise of official power will not create municipal

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[26] Moreover, *Praprotnik* allows municipalities to reduce the risk of liability based on deliberately indifferent exercises of municipal power by supervisory employees, even those supervisors with policymaking capacity, simply by retaining ultimate veto power in a "Board." 485 U.S. at 127 (plurality). In that way, municipalities can effectively separate and insulate the "final power" from those employees who are most likely to have the awareness of facts sufficient to give rise to the "deliberate indifference" that may directly cause a particular constitutional deprivation.

liability unless it directly results in the precise constitutional violation portended by its deliberate indifference. *Id.* at 391.

One need only spend a few days in the Federal Reporters researching the last decade of § 1983 municipal liability cases to understand just how thoroughly municipalities have already been shielded from liability. What one will find is that, about three times a decade, in any given circuit, a § 1983 plaintiff will actually win a sizable verdict (in excess of $50,000) against a municipality and survive appellate scrutiny.[27] Even in those rare plaintiff victories, the size of damage awards is rarely disastrous because punitive damages are not recoverable from the municipality. *Newport v. Fact Concerts, Inc.*, 453 U.S. 247 (1981).

Given the already imposing barriers to § 1983 municipal liability, and the dearth of plaintiff victories, *Monell* is fast becoming an "attractive nuisance," holding out to constitutionally injured citizens an increasingly illusory promise of recovery from what is often the only source of adequate compensation. The door to municipal liability under § 1983 has been left open just a crack – a crack through which deserving plaintiffs who truly can show municipal fault can still squeeze. Jill Brown is such a person. To deprive her of victory would not be due to an absence of municipal fault, as this is patently not a case that depends on *respondent superior*; rather, to deprive her of the jury's verdict would require an arbitrary definition of fault previously unknown in the

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[27] This "survey" was found by pulling every case in the Federal Reporters since late 1985 (through the June 15, 1996 Shephard's Citator) that cited *Monell*. (covering from 778 F.2d through 78 F.3d) While this survey is hardly scientific, it surely produces a representative sample of cases. Fewer than 70 cases were found where plaintiffs won an "ultimate victory" (winning a jury verdict and "keeping" it) against a municipality. Several won only injunctive relief or nominal damages. Several others were remanded for a determination of damages or simply failed to note the amount won. Of the 47 cases that provided information on damages, 15 involved amounts less than $50,000, 18 involved damages from $50,000-$200,000, and only 14 involved damage awards greater than $200,000.

whole history of tort law – a view of fault that would uniquely apply to municipal corporations, and only in § 1983 cases.

But this case is not just about Jill Brown. It is about whether § 1983 provides a meaningful remedy to those who suffer constitutional injuries due to deliberate municipal selection of the lawless to be law enforcers. Denying Petitioner's arbitrary loophole to municipal liability will not only benefit those whose constitutional injuries are fairly attributable to municipal fault, it will benefit society by encouraging something more than "deliberate indifference" from those who hand out badges, and, in the long run, it will promote law enforcement itself. Due to recent publicity generated by videotapes of police beatings and audiotapes of police racism, it is hardly surprising that we are currently in an era of increasing community distrust of police. Unfortunately, this has a substantial impact on the ability of good police officers (surely the vast majority) to do their jobs safely and effectively: "The great advantage of police compliance with the law is that it helps to create an atmosphere conducive to a community respect for officers of the law that in turn serves to promote their enforcement of the law." R. Traynor, Lawbreakers, Courts, and Law-Abiders, 41 Journal of the State Bar of California 458, 478 (July-August 1966). Of course, an environment of community distrust of law enforcement, and the attendant lack of public confidence therein, was precisely the type of environment that motivated Congress to enact what is now § 1983. This Court can help to alleviate such distrust simply by rejecting Petitioner's arbitrary views of municipal liability that have nothing at all to do with true "fault," and keeping the door to § 1983 municipal liability open (just a crack) for those plaintiffs like Jill Brown who can demonstrate that municipal fault caused their constitutional injuries.

CONCLUSION

For all the foregoing reasons, the holding of the Fifth Circuit should be affirmed.

Respectfully submitted,

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No. 95-1100

In The

Supreme Court of the United States

October Term, 1995

THE BOARD OF THE COUNTY COMMISSIONERS OF BRYAN COUNTY, OKLAHOMA,

Petitioner,

vs.

JILL BROWN, *et al.*,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

REPLY BRIEF FOR PETITIONER

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The arguments advanced by respondent cover a very large waterfront. She engages in a disquisition on the law of vicious dogs (Respondent's Brief at pp. 39-41), describes the psychological process by which pre-schoolers internalize the meaning of "fault" (p. 46) and reports results of a haphazard survey of "every case in the Federal Reporters since late 1985" announcing dollar amounts plaintiffs have retained on appeal in 42 U.S.C. § 1983 cases against municipalities. (p. 48 n. 27). That sort of rhetoric sheds little light on the scope of § 1983 liability in suits against municipalities.

When respondent speaks to the issue of municipal liability, she avoids the most conspicuous questions posed in the case: Is it *unconstitutional policy* for a sheriff to hire a reserve police cadet who has pleaded guilty to misdemeanor assault for his role in a college-campus fight? Is it "obvious" that hiring a person with one misdemeanor assault would result in his subsequent violation of a citizen's constitutional rights? Was § 1983 intended to vest federal courts with authority to veto State legislation governing qualifications of law enforcement personnel?

Respondent's case fails for three reasons. It fails because Bryan County's hiring of Stacy Burns was not an unconstitutional "policy" with implications beyond the singular hiring decision itself; therefore, the hiring of Burns cannot form the basis for holding Bryan County liable under § 1983. Second, there is no proof to a "moral certainty" (or even preponderance of evidence) that hiring an officer with one misdemeanor assault conviction would cause his subsequent use of unconstitutional force during the course of an arrest. Finally, it fails because federal courts should not be in the business of supplanting State laws governing personnel qualifications when there is no evidence that the State, or any of its agencies, has ever been placed on notice that conformity with State hiring standards necessarily portends the deprivation of constitutional rights.

I.

THERE IS NO EVIDENCE THAT BRYAN COUNTY ADOPTED UNCONSTITUTIONAL POLICY OF INADEQUATE SCREENING.

A. Bryan County Has Consistently Argued That Oklahoma's Laws, Rather Than Sheriff's Particular Hiring Decision, Represent County's Final Employment Policy.

Both respondent and her *amicus curiae* have accused Bryan County of raising the question of Sheriff Moore's authority to enact final policy "for the first time in any court." (Respondent's Brief at pp. 1 n. 1, 23-24); (NOW *Amicus* Brief at pp. 10-11). They are both wrong.

In its main brief in the Fifth Circuit, Bryan County argued, as it has here, that Sheriff Moore's authority to hire Burns does not necessarily equate with authority to adopt final employment policy for the County. Bryan County's brief argued:

> . . . the Court clarified in *Pembaur v. City of Cincinnati*, 475 U.S. 469 (1986) that "[m]unicipal liability attaches only where the decisionmaker possesses *final* authority to establish municipal policy with respect to the action ordered. The fact that a particular official — even a *policymaking official* — has discretion in the exercise of particular functions does not, without more, give rise to municipal liability based on an exercise of that discretion." *Id.* at 481-82 (emphasis supplied).

> *Pembaur* thus made clear that municipal liability cannot hinge on the mere fact that the sheriff, even in the role of "policymaker", hires and fires employees. *Id.* at 483 n. 12.[1] Since there is no evidence that Bryan County's Board of Commissioners delegated its power to establish final employment policy to the Sheriff, there is no basis for § 1983 liability against the County with respect to its hiring policies.

(Appellants' Brief at p. 22).

In addition, the County's objections to the district court's jury charge articulated why Sheriff Moore's decision to hire Burns could not have been County "policy" under § 1983. First, the County argued that the Sheriff's conformity with State law supported a good-faith defense to liability. (J.A. 124a). Second, Bryan County specifically objected to the court's jury instruction that Sheriff Moore's hiring of Stacy Burns constituted County "policy" and argued that there is no evidence of the adoption of any "policy" by the Sheriff. (J.A. 124a-125a, 130a). Bryan County requested the court to affirmatively instruct the jury that the County had complied with all State regulations regarding hiring and training. (J.A. 128a). Bryan County advanced these same arguments in its certiorari petition. (Petition for Writ of Certiorari at pp. 6-7, 9-11, 17).

The question of Sheriff Moore's authority to make *final* employment policy for Bryan County has been preserved, was argued in the courts below, and is properly before this Court.

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1. Footnote 12 is the same note quoted in the County's Brief for Petitioner at p. 19. That footnote demonstrates why Bryan County's stipulation that Sheriff Moore was a policymaker for the sheriff's department is not proof that he had authority to establish final county employment policy.

B. Bryan County Is Not Subject To Liability Under § 1983 For Isolated One-Time Decision To Hire A Particular Officer.

Respondent asserts that *City of Canton v. Harris* "expressly envisions municipal liability based on one poorly trained employee." (Respondent's Brief at p. 26). Measured by the precise words and legal principles expressed in *Canton*, that contention is remarkably misguided.

In *Canton*, Justices White and O'Connor were precise in stating what sort of proof would *not* support municipal liability. Justice White did not mince words: "That a particular officer may be unsatisfactorily trained will not alone suffice to fasten liability on the city, for the officer's shortcomings may have resulted from factors other than a faulty training program."[2] *Canton*, 489 U.S. at 390-391. As a predicate to municipal liability, Justice O'Connor embraced a construction of the term "deliberate indifference" as requiring proof of a *pattern* of violations from which a kind of "tacit authorization" by city policymakers can be inferred."[3] *Id.* at 397. Further, Justice

2. Respondent cites the fact that Burns had employed the arm-bar technique in prior arrests as evidence that Burns "enjoyed" authority. Respondent's Brief at 4. However, the fact that no complaint had ever been made about his use of force while on duty suggests strongly that Burns' training in the proper use of that technique served him, and the sheriff's department, well prior to Jill Brown's complaint. (Tr. 582-83, 628). It certainly could be argued that Burns' history in that respect demonstrated ability to properly carry out law enforcement work without injury to himself or others.

3. The evidence in this case was undisputed that Bryan County had *never* had complaints or lawsuits filed against it in connection with its employment of Reserve Deputies. (Tr. 652). Indeed, during Sheriff Moore's tenure, there had *never* been any complaint made against Bryan County's Sheriff's Department alleging that officers or deputies were abusive to citizens or otherwise engaged in misconduct. (J.A. 112a).

O'Connor agreed with *Tuttle* that "isolated misconduct of a single, low-level officer" would not support municipal liability. *Id.*, 399-400, *quoting Oklahoma City v. Tuttle*, 471 U.S. 808, 831 (1985) (Brennan, J., concurring in part and concurring in judgment).

In our case, the Fifth Circuit's opinion imposes liability for the "isolated misconduct" of a "particular" "low-level officer" who is alleged to have been "unsatisfactorily trained" or inadequately screened. Indeed, the jury questions relevant to the County's § 1983 liability are premised on Bryan County's hiring and training policies *only* as they relate to ***"the case of Stacy Burns."***[4] (App. 40a-4(a)). Respondent has written many pages of overwrought analysis of *Canton*, but in the end, *Canton* quite simply defeats her case.

Moreover, Justices White and O'Connor were not writing on a clean slate. Their concurring opinions in the plurality decision of *Pembaur v. City of Cincinnati*, 475 U.S. 469 (1986) suggest that, for them, "policy" presupposes the enactment of a plan the effects of which have universal application throughout the governmental unit. In *Pembaur*, for example, Justices White and O'Connor emphasized that the city and county's decision to forcibly enter private property to serve capiases was "standard operating procedure," rather than an ad hoc decision limited only to ***"the case of Bertold Pembaur."*** 475 U.S. at 485, 491. The county's "standard operating procedure" reverberated far beyond the particular instance involving Bertold Pembaur, and therefore justified the plurality's holding that the county's "policy" created liability under § 1983.

4. Bryan County objected to the pointed references to Stacy Burns and asked the court to instruct the jury that "one incident of police misconduct or one incident of violation of hiring and training policy cannot in and of itself constitute a policy and cannot grant the right to consider liability on the County in behalf of the Plaintiff." (J.A. 125a, 132a).

Another consideration makes *Pembaur* particularly inapposite. Whereas the forcible-entry decision in *Pembaur* "officially sanctioned or ordered" the violation of Pembaur's Fourth Amendment rights (475 U.S. at 480, 484), Sheriff Moore's decision to hire Stacy Burns was not, by any stretch of the imagination, "the functional equivalent of a decision by the city itself to violate the Constitution." *See Canton*, 489 U.S. at 395 (O'Connor, J., concurring in part and dissenting in part). Indeed, there is no evidence that Bryan County was even constructively on notice that Stacy Burns would "likely" or "probably" commit an act of excessive force. At most, the evidence suggested a "potential disposition." (Tr. 316; J.A. 43a). Obviously, if "potentiality" were the standard, municipalities would "potentially" be liable under § 1983 for each and every hiring decision made. We know, however, that § 1983 does not create such *respondeat superior* liability. *Monell v. Dept. of Social Services of New York*, 436 U.S. 658, 691 (1978).

In any event, it is telling that the circuits have not viewed *Pembaur* as an invitation to expand the scope of municipal liability in a manner that would engulf *Monell*. Even respondent — who professes to have canvassed every single federal circuit decision discussing § 1983 municipal liability since 1985 — cannot point to a single case in which *Pembaur* was utilized to hold that the one-time execution of a facially-constitutional municipal policy properly results in municipal liability. There are numerous cases, however, which hold the opposite. Ironically, the court requiring the most exacting proof of municipal fault has been the Fifth Circuit. *See Fraire v. City of Arlington*, 957 F.2d 1268 (5th Cir.), *cert. denied*, 506 U.S. 973 (1992); *Benavides v. County of Wilson*, 955 F.2d 968 (5th Cir.), *cert. denied*, 506 U.S. 824 (1992); *Wassum v. City of Bellaire*, 861 F.2d 453 (5th Cir. 1988); *Stokes v. Bullins*, 844 F.2d 269 (5th Cir. 1988); *Languirand v. Hayden*, 717 F.2d 220 (5th Cir. 1983), *cert. denied*, 467 U.S. 1215 (1984).

II.

RESPONDENT FAILED TO ESTABLISH REQUISITE CAUSATION BETWEEN COUNTY'S HIRING OF STACY BURNS AND ALLEGED CONSTITUTIONAL DEPRIVATION.

In respondent's view, *Canton* envisions municipal liability based on evidence that the municipality failed to properly train or hire one particular officer, even in the absence of evidence of a pattern of deprivations sufficient to place the city on notice of the particular deficiency. (Respondent's Brief at p. 7, n. 10). As demonstrated above, however, that argument is contrary to *Canton*. Perhaps recognizing the defect in that approach, respondent next moves to what becomes the central underlying theme of her brief — that § 1983 liability is the equivalent of common law tort liability and should therefore be analyzed under the same principles.

Respondent attempts to transform her suit against Bryan County into a garden variety common law tort. Respondent's formula for municipal liability, however, ignores the last twenty years of § 1983 jurisprudence, which has established that § 1983 is not a federal negligence statute. There is some irony in the fact that respondent initially recognizes this Court's characterization of causation standards in terms of "direct cause," "closely-related cause" or "affirmative link," yet then equates causation under § 1983 with "the traditional standard of proximate cause." Respondent's Brief at 33. Rather than speculate, the proper focus should be on this Court's own construction of § 1983 "causation."

As a beginning point, Justice O'Connor has observed that "[t]he 'causation' requirement of § 1983 is a matter of *statutory interpretation* rather than of common tort law." *City of Springfield v. Kibbe*, 480 U.S. 257, 269 (1987) (O'Connor, J.,

dissenting from dismissal of writ of certiorari) (emphasis supplied). Consequently, even though § 1983 can properly be described as a species of tort liability, it has a decidedly unique pedigree. *See Martinez v. California*, 444 U.S. 277, 285 (1980); *Daniels v. Williams*, 474 U.S. 327, 330 (1986). It is particularly significant, then, that § 1983's lineage in this Court portrays causation as something more rigid, and less capable of a negligence construction, than proximate cause. Indeed, it has been described as "the functional equivalent of a decision by the city itself to violate the Constitution." *Canton*, 489 U.S. at 395 (O'Connor, J., concurring in part and dissenting in part).

Municipal liability under § 1983 has always been regarded with due deference to the fact that the authors of the Ku Klux Klan Act were antipathetic to the notion of municipal liability in the first place. Thus, *Canton* reminds the reader that municipal liability cannot exist unless "the municipality *itself* causes the constitutional violation at issue." *Id.* at 385 (emphasis in original). That deference is not consistent with the general "foreseeability" component of proximate cause. Accordingly, Bryan County's liability under § 1983 must be measured by the proof required in *Canton* and not lesser standards of common law tort liability. *See Rankin v. City of Wichita Falls, Tex.*, 762 F.2d 444, 448-49 n. 4 (5th Cir. 1985) (different policies behind § 1983 and common law tort liability support judicial reluctance to "conflate section 1983 liability with ordinary tort liability . . .").

Under *Canton*, inadequate training sufficient to establish municipal liability requires proof that "in light of the duties assigned . . . the need for more or different training is so obvious, and the inadequacy so likely to result in the violation of constitutional rights, that the policymakers of the city can reasonably be said to have been deliberately indifferent to the need." *Canton*, 489 U.S. at 390. This degree of awareness arises either: (1) when the policymaker knows to a "moral certainty" that his failure to train will result in constitutional violations; or

(2) when the need for training is "plainly obvious" because of frequent constitutional violations. *Id.* at 390 n. 10. In addition, a "very close causal connection" is required in order to prevent federal imposition of "prophylactic" duties upon governments. *Id.* at 395 (O'Connor, J., concurring).

Assuming the Court even recognizes "hiring" decisions as potentially subjecting municipalities to § 1983 liability, the evidentiary standards should at least approximate the dictates of *Canton* with respect to causation. Thus, municipal hiring decisions would be reviewable under § 1983 if a particular hiring practice results in a pattern of constitutional deprivations sufficient to put the municipality on notice of the deficiency.[5] Alternatively, a single hiring decision could subject a municipality to liability if it is clear to a moral certainty that a constitutional deprivation would result.[6] If neither a pattern nor a moral certainty is present, *Canton* does not authorize the imposition of municipal liability.

Respondent asserts that neither deliberate indifference nor causation as described in *Canton* are required in the hiring

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5. For example, although it is constitutional to hire color blind traffic-control officers, experience may establish that such a hiring policy results in a pattern of traffic fatalities. Once on notice of that consequence, a municipality's failure to take corrective measures could conceivably result in liability under § 1983.

6. This situation might arise if a municipality hired an officer despite a psychiatric diagnosis of paranoid schizophrenia manifested by a history of violent attacks, resulting in serious physical injuries, which are certain to recur. In our case, there is no evidence that Stacy Burns, who took an "MMPI" test prior to his formal law enforcement training, suffered from any such malediction. (Tr. 495-96, 578).

context. In her view, *proximate* cause[7] should replace *direct* cause and deliberate indifference should be eliminated altogether. (Respondent's Brief at pp. 29-30 n. 17, 18). She further proposes that deliberate indifference, if retained as a requirement, should be defined in terms of "recklessness" and not "certainty." (Respondent's Brief at p. 30 n. 18). These lesser standards of liability are without support from § 1983 or the Constitution.

This court has never held that a hiring decision, in itself, can subject a city to liability under § 1983. Clearly, providing for municipal liability based on a single hiring decision so closely approximates *respondeat superior* liability as to be virtually indistinguishable. The Court's concerns regarding municipal liability for inadequate training claims are only exacerbated when a municipality's hiring decisions are called into question. Thus, there is even more reason to insist on a rigorous standard for so-called inadequate hiring claims.[8]

Moreover, it is exactly this type of lax interpretation of the municipal liability requirements that would permit back-door

7. Liability would be authorized, under respondent's proximate cause theory, if the municipality has notice of a prospective employee's "tendency" to commit a particular violation which subsequently occurs. However, respondent's evidence falls short even if common law tort principles were to apply. Respondent's expert testified only that Burns' had "a potential" for physical aggression. (Tr. 316; J.A. 43a). The same statement could be made with respect to any candidate for law enforcement service. Indeed, physical aggression is, at least in some respect, a necessary component of law enforcement service.

8. In the end, however, *Canton's* framework for causation may be insufficient in the hiring context. One cannot contest that any constitutional injury would have been avoided if the decision to hire the offending employee had not been made. This inquiry ultimately devolves into but-for causation. This is precisely the nature of *respondeat superior* liability.

vicarious liability "simply because the municipality hired one 'bad apple.' " *Tuttle*, 471 U.S. at 821. Section 1983 is not a "federal good government act" for municipalities. *Canton*, 489 U.S. at 396 (O'Connor, J., concurring). Instead, liability must be "predicated on the municipality's *own* constitutional violations." *Kibbe*, 480 U.S. at 268.[9]

III.

SECTION 1983 DOES NOT PERMIT FEDERAL COURTS TO OVERTURN STATE LEGISLATION WHICH COULD "THEORETICALLY" RESULT IN CONSTITUTIONAL DEPRIVATION.

If causation is relaxed to the point respondent advocates, States that currently do not disqualify police applicants on the ground of prior petty offenses will be compelled to re-evaluate their policies — not because misdemeanor applicants are somehow incapable of rendering superior law-enforcement service, and not because a policy allowing counties to hire applicants with misdemeanor backgrounds is unconstitutional — but because a federal court has decided a county is "precluded" from hiring an officer who pleaded guilty for his role in a college fight.[10] Unquestionably, the Fifth Circuit's holding has that effect.

9. The court's pronouncements arise from important State and local policy concerns. Adopting lesser State tort principles as suggested by respondent would move toward the federalization of State tort law under § 1983. Moreover, applying State tort concepts of proximate cause to 1983 actions would expose municipalities to overwhelming damage liability and allow federal jury second guessing of purely constitutional municipal decisions concerning all manner of day-to-day administration. These federal decisions based on civil rather than constitutional fault would cripple local governments in the management of their affairs.

10. The only evidence of Burns' role in this fight was that he pushed someone who had first pushed him. (J.A. 90a).

Far from rationalizing the Fifth Circuit's nullification of Oklahoma's personnel prerogatives, respondent actually embraces such "federal incursions into essentially state-oriented affairs." (Respondent's Brief at pp. 13-14). She argues that § 1983's primary purpose was to provide federal protection where State laws "*either in theory or in practice*, do not do the trick." *Id.* at 14 (emphasis supplied). The italicized portion of that quote epitomizes the fundamental error in respondent's expansive view of the reach of raw federal power. It is *not* the role of federal courts to examine *theoretical* applications of State law, isolate laws which *potentially* threaten federal rights, and then *exorcise* them as a purely preemptive measure. *See Rizzo v. Goode*, 423 U.S. 362, 379-380 (1976). However, stripped of its dramatic prose, respondent proposes that federal courts fill precisely that role as a "complement" to State law. (Respondent's Brief at p. 14).

Nowhere does the Constitution empower federal courts to revise state laws which are theoretically flawed. Instead, our system of federalism accommodates two seemingly contradictory principles: it rejects the idea of absolute federal prerogative, yet celebrates constitutional supremacy. The real "trick" is to balance these twin towers of government. *Gregory v. Ashcroft*, 501 U.S. 452, 459 (1991). In *Gregory*, this Court recognized the advantages of undertaking that balancing effort:

> This federalist structure of joint sovereigns preserves to the people numerous advantages. It assures a decentralized government that will be more sensitive to the diverse needs of a heterogeneous society; it increases opportunity for citizen involvement in democratic processes; it allows for more innovation and experimentation in government; and it makes

> government more responsive by putting the States in competition for a mobile citizenry.

Id. at 458. This federalist structure, properly construed, would recognize that the composition of law enforcement personnel is properly a matter of State law until such time as the State, or its agencies, are placed on notice that application of its law (in practice rather than theory) results in the deprivation of constitutional rights.

In our case, the diversity of laws respecting the selection of law enforcement personnel has been demonstrated in the appendix to the National Association of Counties' *amicus curiae* brief. Some States have no standards, others are quite restrictive. It is far from clear which is "best," which more efficiently dispenses effective law enforcement, or which more zealously guards federal civil rights. It is clear, however, that the States' right of experimentation — their ability to propose laws on widely different theoretical premises — is secured by a proper recognition of federalism. *See San Antonio Independent School Dist. v. Rodriguez*, 411 U.S. 1, 49-50 (1973). That federalism secures this right is not undermined by the fact that any of these State employment standards could *theoretically* result in the hiring of officers who later commit acts violative of the Constitution.

Finally, respondent consigns *United States v. Lopez*, 514 U.S. __, 115 S. Ct. 1624 (1995) to a footnote and contends it has nothing to say about the interplay between State and Nation under § 1983 and the Constitution. Respondent is, of course, correct in stating that *Lopez* "involved a federal law passed pursuant to the Commerce Clause." (Respondent's Brief at p. 16 n. 12). However, that is a decidedly stingy description of a decision that has far-reaching implications where there is equivalent tension between the domain of States and the realm of

the Nation. Justice Kennedy's concurrence in *Lopez* articulates how federalism affects allocation of power between the States and Nation. That subject is not confined to commerce; indeed, it embraces the entire structure of our government.

Whether reviewing a congressional act or a circuit opinion, "the federal balance is too essential a part of our constitutional structure and plays too vital a role in securing freedom for us to admit inability to intervene when one or the other level of Government has tipped the scales too far." *Lopez*, 514 U.S. at __, 115 S. Ct. at 1639 (Kennedy, J., concurring). There is reason to intervene here. The Fifth Circuit's opinion elevates the federal judiciary above democratic processes that resulted in Oklahoma's adoption of hiring standards in the first place. If the citizens of Oklahoma determine that those standards are too lax, whom do they hold accountable? The State can deny responsibility because the federal judiciary has now usurped the field. The local sheriff — the person most closely linked to the people — can demur because he is twice-removed from the new federal role. In place of State and local accountability, the Fifth Circuit would substitute federal courts as the final arbiters of personnel standards.

"The resultant inability to hold either branch of the government answerable to the citizens is more dangerous even than devolving too much authority to the remote central power." *Lopez*, 514 U.S. at __, 115 S. Ct. at 1638-39 (Kennedy, J. concurring).

CONCLUSION

Respondent accuses Bryan County of a litany of bad motives. She suggests that Bryan County filed a petition in this Court simply because it "doesn't like the implications of a federal law" (Respondent's Brief at p. 16 n. 12); that Bryan County is attempting to "repeal" § 1983 (pp. 15, 35-36); and that Bryan County is asking for a license to place "time bombs on our streets and in our schools." (p. 46). Respondent's resort to emotion, rather than reason, infects her analysis of *Canton* and blinds her to the centrality of federalism as it relates to the scope of § 1983 municipal liability.

Bryan County is seeking nothing more than fidelity to *Monell* and *Canton*. The Court's decisions in those cases properly balance the federalism interests which caution against federal courts' usurpation of State laws that neither directly violate constitutional principles nor would "obviously" result in constitutional deprivations.

Respectfully submitted,

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR AMICUS CURIAE, THE CITY OF NEW YORK

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR AMICUS CURIAE, THE CITY OF NEW YORK

STATEMENT OF FACTS

INTEREST OF AMICUS CURIAE

The City of New York ("the City") submits this brief as amicus curiae in support of the position advanced by

petitioner, the Board of the County Commissioners of Bryan County, Oklahoma ("the County"). The City argues that this Court should reverse the judgment of the United States Court of Appeals for the Fifth Circuit, entered October 23, 1995, insofar as that judgment affirmed the imposition of liability upon the County under 42 U.S.C. § 1983. The Court of Appeals held that the County was liable under that statute for a sheriff's solitary action in hiring a reserve deputy sheriff.

The City has a practical interest in the issue of law presented here. The City is a frequent defendant in actions brought pursuant to 42 U.S.C. § 1983. Between 1993 and 1995, inclusive, plaintiffs commenced approximately 550 actions against the City in federal

courts under that statute for alleged constitutional violations by police officers and correction officers. Other such actions were commenced against the City in state court during that time. In those three calendar years, settlements and judgments in federal § 1983 actions involving police officers and correction officers resulted in payouts amounting to approximately $18 million. The parameters of municipal liability under § 1983 have a concrete impact on the public fisc of the City.

The City frequently is a defendant in cases similar to this. A usual claim in police and correction cases against the City is that the City was negligent in hiring, training, or supervising the officer whose behavior is at issue. In New York City, where employing a multi-

cultural police force is an important policy goal, individual hiring decisions should not be considered proof of deliberate indifference amounting to a policy or practice. One isolated decision of a final policymaker is not necessarily a final agency policy or practice. The instant case presents an opportunity for this Court to clarify difficult questions regarding municipal liability for practices or policies which are not in themselves unconstitutional.

ARGUMENT

THE COURT OF APPEALS ERRED IN HOLDING THAT THE COUNTY WAS LIABLE UNDER 42 U.S.C. § 1983 FOR THE SHERIFF'S SINGLE DECISION TO HIRE A RESERVE DEPUTY SHERIFF. THE PLAINTIFFS FAILED TO MAKE A SUFFICIENT SHOWING THAT THE COUNTY HAD BEEN DELIBERATELY INDIFFERENT TO A VIOLATION OF THEIR CONSTITUTIONAL RIGHTS.

The City is confident that the parties to this appeal will brief the issues competently and comprehensively.

The City wishes only to submit its comments on the issue of municipal liability for decisions involving the hiring and training of employees, especially police and correction officers. Without some minimum standards for proof of municipal indifference to constitutional violations, almost all allegations of such indifference will suffice to send a case to the jury. Those minimum standards are already set forth in prior precedents of this Court.

In Monell v. Department of Social Services of the City of New York, 436 U.S. 658 (1978), this Court held that municipalities are liable under 42 U.S.C. § 1983 for constitutional violations only where "execution of a government's policy or custom, whether made by its lawmakers or by those whose edicts or acts may

have suffered their injury absent the County's policy of maintaining a police force. See City of Oklahoma City v. Tuttle, 471 U.S. 808, 823 (1985)(plurality opinion).

This Court has considered municipal liability arising from a constitutional policy in the context of the training and supervision of police officers. See, e.g., City of Canton, Ohio v. Harris, 489 U.S. 378 (1989). The same principles have been applied in the context of the hiring of police officers. Baker v. Putnal, 75 F.3d 190 (5th Cir. 1996). In Walker v. City of New York, 974 F.2d 293 (2d Cir. 1992), cert. denied, 507 U.S. 961 (1993), the United States Court of Appeals for the Second Circuit accurately observed that the requirement of tracing

constitutional torts to a municipal policy (Id. at 297)

> ... necessarily molds many § 1983 claims against municipalities into "failure to train" or "failure to supervise" claims. It is only by casting claims in this way that plaintiffs can link an actual decision by a high level municipal official to the challenged incident.

An alleged failure to train or supervise an officer can result in municipal liability under § 1983 only if it proceeds from a municipal policy or custom.

In City of Canton, Ohio v. Harris, this Court held that "there are limited circumstances in which an allegation of 'failure to train' can be the basis for liability under § 1983." Id. at 387. This Court further held that "the inadequacy of police training may serve as the basis for § 1983 liability only

where the failure to train amounts to deliberate indifference to the rights of persons with whom the police come in contact." Id. at 388. The instant case presents the issue of how a plaintiff can prove such deliberate indifference.

In Vann v. City of New York, 72 F.3d 1040, 1049 (2d Cir. 1995), the United States Court of Appeals for the Second Circuit addressed the proof of deliberate indifference in the context of claims of inadequate supervision of police:

> To prove such deliberate indifference, the plaintiff must show that the need for more or better supervision to protect against constitutional violations was obvious. [citation omitted] An obvious need may be demonstrated through proof of repeated complaints of civil rights violations; deliberate indifference may be inferred if the complaints are followed by no meaningful attempt on the part of the municipality to investigate or to forestall

> further incidents. [citations omitted] Deliberate indifference may also be shown through expert testimony that a practice condoned by the defendant municipality was "contrary to the practice of most police departments" and was "particularly dangerous" because it presented an unusually high risk that constitutional rights would be violated. [citations omitted]

The Court of Appeals thus accurately noted two different ways of proving a municipality's deliberate indifference to the violation of constitutional rights. One method involves proof of past civil rights complaints. The other method involves proof of an obviously dangerous practice.

The first method of proof is apparently not involved in the instant case. There apparently was no proof of any prior civil rights violations by the County. The Court of Appeals, at any

rate, did not base its decision on such a ground in this case.

The second method of proof was invoked by the Court of Appeals in this case (67 F.3d at 1184-1185):

> We also find the evidence sufficient for a jury to conclude that Sheriff Moore's decision to hire Burns amounted to deliberate indifference to the public's welfare. [citations omitted] In light of the law enforcement duties assigned to deputies, the obvious need for a thorough and good faith investigation of Burns, and the equally obvious fact that inadequate screening of a deputy could likely result in the violation of citizens' constitutional rights, Sheriff Moore can reasonably be said to have acted with deliberate indifference to the public's welfare when he hired Burns. [citation omitted] The failure to conduct a good faith investigation of the prospective employee amounted to Sheriff Moore deliberately closing his eyes to the Burns' background. Such indifferent behavior cannot be tolerated when the prospective applicant

> will be employed in a position of trust and authority.

Although the quoted passage vividly expresses the indignation of the Court of Appeals, it is in error in stating that there was sufficient proof to support a jury finding of deliberate indifference on the part of the County.

The holding of the Court of Appeals is infirm on the factual record. It appears that Deputy Burns had several traffic violations and one misdemeanor conviction arising from a fight with fraternity brothers when he was a teenaged college student. This is not a criminal record which can prove to a rational trier of fact that the Sheriff was deliberately indifferent to a substantial risk that the newly-hired deputy would commit civil rights violations. Even had the Sheriff

obtained the details of Burns' past encounters with the law, nothing there would have indicated that Burns was a poor candidate for deputy sheriff. In essence, there is no causation proven on these facts.

The Court of Appeals erred for a second reason. By enacting a general statute, the legislature of the State of Oklahoma has imposed standards for the hiring of deputy sheriffs. Candidates with felony convictions or convictions for crimes of moral turpitude are disqualified. Candidates must also undergo psychological testing and a police training course. The municipality has discretion to hire candidates with misdemeanor convictions. In this case, the Sheriff complied with state law in hiring the deputy.

The state statute provided guidelines for the hiring of Deputy Burns. The Sheriff followed those guidelines. The Sheriff obtained Burns' criminal record, sent him for psychological testing, and then hired and trained him pursuant to state law. By following state law, the Sheriff acted in a fashion which cannot be considered deliberate indifference for purposes of municipal liability. One cannot charge a municipality with deliberate indifference in being guided by standards adopted by the state legislature. In the small area of discretion exercised by the Sheriff, Deputy Burns' past criminal record was not one which required a refusal to hire. The Court of Appeals erred in holding that the evidence supported the jury verdict to the contrary.

Unless standards of proof are imposed upon the concept of deliberate indifference, claims such as the one presented here will almost always be allowed to go to the jury, where sympathy for an injured plaintiff will often result in municipal liability where there was no deliberate indifference to civil rights violations. Those standards of proof require proof of past violations or the ignoring of an inevitably dangerous situation. Disagreements over discretionary decisions should not amount to proof of deliberate indifference. This Court should clarify the concept of deliberate indifference and how it can be proven. This Court should hold that in order to prove deliberate indifferences that amounts to a policy or practice, a plaintiff must prove more than one

instance of constitutional infraction, combined with no meaningful response by the municipality. If one incident can, by itself, prove deliberate indifference which amounts to a policy or practice, liability on the basis of respondeat superior has been injected into the law of § 1983. This Court should not allow municipal liability to spread beyond the sensible limits set forth in Monell.

CONCLUSION

FOR THE REASONS STATED, THE JUDGMENT OF THE COURT OF APPEALS SHOULD BE REVERSED, AND JUDGMENT SHOULD BE ENTERED ON BEHALF OF THE COUNTY.

Respectfully submitted,

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No. 95-1100

IN THE
Supreme Court of the United States
OCTOBER TERM, 1995

THE BOARD OF THE COUNTY COMMISSIONERS OF BRYAN COUNTY, OKLAHOMA,
Petitioner,
v.
JILL BROWN,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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BRIEF OF THE NATIONAL ASSOCIATION OF COUNTIES, NATIONAL LEAGUE OF CITIES, U.S. CONFERENCE OF MAYORS, INTERNATIONAL CITY/COUNTY MANAGEMENT ASSOCIATION, AND INTERNATIONAL MUNICIPAL LAWYERS ASSOCIATION AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Whether a local government can be held liable under § 1983 for hiring a law enforcement officer with a prior misdemeanor record, where there has been no showing that it was obvious to the policymaker that the hiring decision was substantially likely to cause the violation of Fourth Amendment rights.

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INTEREST OF THE *AMICI CURIAE*

Amici, organizations whose members include county and municipal governments and officials throughout the United States, have a compelling interest in legal issues that affect local governments. The resolution of the question presented in this case—whether, and

under what circumstances, a local government can be held liable under 42 U.S.C. § 1983 for having a policy of "inadequate hiring" of law enforcement personnel —threatens to expose local governments to unprecedented liability.

In most States, a record of misdemeanor offenses does not *per se* disqualify a person from being hired as a law enforcement officer. *See* Appendix. Rather, it is only one of several criteria evaluated in the inherently subjective hiring decision, which commonly includes psychological testing and interviews of the candidate and other persons. *See* Commission on Accreditation for Law Enforcement Agencies, *Standards For Law Enforcement Agencies* 32-2—32-3 (3d ed. 1994). The standard of liability adopted by the court of appeals would involve federal courts in "an endless exercise of second-guessing" police hiring decisions, with grave consequences for the administration of local law enforcement agencies. *City of Canton v. Harris*, 489 U.S. 378, 392 (1989).

Because this issue is of fundamental importance to *amici* and their members, this brief is submitted to the Court to assist it in the resolution of this case.[1]

STATEMENT OF THE CASE

Respondent Jill Brown was injured when she was arrested by Reserve Deputy Stacy Burns following a high speed chase from a routine checkpoint. Pet. App. 4a-5a. Burns was employed by petitioner Bryan County, Oklahoma as a reserve deputy sheriff at the time of the arrest. Respondent's injuries were

[1] The parties have consented to the filing of this brief *amicus curiae*. Letters indicating their consent have been filed with the Clerk of the Court.

sustained as a direct result of the forcible arrest effectuated by Burns. Pet. App. 5a.

Burns had been hired as a reserve deputy sheriff by Bryan County Sheriff B.J. Moore under authority conferred by the legislature of the State of Oklahoma. Okla. Stat. tit. 19, § 547(B). While Burns had a prior criminal record consisting of various traffic offenses and other misdemeanors, this did not disqualify him from law enforcement employment under guidelines adopted by Oklahoma. Okla. Stat. tit. 70, § 3311(D)(2)(a). In addition, Burns had completed the Minnesota Multiphasic Personality Inventory, which is a psychological evaluation that addresses a person's suitability for law enforcement work. Tr. 578; Okla. Stat. tit. 70, § 3311(D)(2)(b).

Under state law, reserve deputies must be accompanied by a "salaried deputy sheriff" while performing their duties until they have completed a full 120-hour training course. Okla. Stat. tit. 19, § 547(B). Because Burns was in the process of completing this course, Sheriff Moore ordered him to be accompanied by a regular deputy and prohibited him from either carrying a firearm or operating a patrol car. J.A. 117a-118a.

Before the incident, Burns had received on-the-job training from regular law enforcement officers of Bryan County. Burns had accompanied officers as they performed their duties and instructed him on proper police procedure. Tr. 580-81. Burns had participated with experienced officers in a number of similar roadblocks. Tr. 583. Burns had watched the Law Enforcement Training Network programs, which are a series of closed-circuit television programs that instruct police officers. Tr. 579. Burns was

attending the Council on Law Enforcement Education and Training (CLEET) program, which is Oklahoma's legislatively-mandated law enforcement education program. Tr. 577-78, 608; Okla. Stat. tit. 70, § 3311.

Respondent brought suit against Burns, Moore, another deputy, and petitioner Bryan County. Respondent sued Burns under 42 U.S.C. § 1983 for excessive force, false arrest, and false imprisonment. Pet. App. 6a. She also sought damages from the County on the ground that Moore, a County policymaker, had improperly hired and inadequately trained Burns. Pet. App. 6a. The district court granted summary judgment to Moore and the other deputy on the § 1983 claims against them. J.A. 28a. The case went to trial on the claims against Burns and Bryan County. Following a jury verdict in favor of respondent, the County appealed.

The Fifth Circuit held that the County could be held liable for Moore's decision to hire Burns. The court reasoned that Moore's decision could be said to fairly represent County policy on employment. Pet. App. 16a-17a. According to the court, the jury could reasonably have found that Moore's hiring of Burns constituted "deliberate indifference to the public's welfare." Pet. App. 23a. The court also concluded that sufficient evidence existed to show that the hiring "actually caused" respondent's injuries. Pet. App. 24a.

The Fifth Circuit originally rejected respondent's failure to train claim on the ground that respondent had not shown a pattern of similar incidents. *Brown v. Bryan County*, 53 F.3d 1410, 1424-25 (5th Cir. 1995). This opinion, however, was superseded by the

Fifth Circuit opinion now on review, which does not discuss the training issue. Pet. App. 4a n.1.

SUMMARY OF ARGUMENT

This Court consistently has rejected efforts in § 1983 cases to impose *respondeat superior* liability upon municipalities for the actions of their employees. By holding petitioner liable in this case for the single act of hiring an employee, the Fifth Circuit decision threatens, contrary to this Court's decisions, to create a regime of *de facto respondeat superior* liability.

Municipalities are liable only for policies that directly cause constitutional deprivations. In cases where the policy itself is unconstitutional or specifically orders or authorizes unconstitutional action, a plaintiff need only show a single deprivation. Where, however, no such facially unconstitutional policy can be identified, a plaintiff must show that the municipality was deliberately indifferent to his constitutional rights. Such a showing requires "considerably more proof" than a single incident of a constitutional deprivation.

To prevent the deliberate indifference standard from devolving into *de facto respondeat superior* liability, this Court has required plaintiffs to show a close causal link and a high degree of foreseeability between the constitutional deprivation at issue and the policymaker's decision. In addition, to ensure that the municipality has notice of the deprivation and that it is not an isolated incident unrelated to the alleged policy, the plaintiff usually must show a pattern of similar violations.

In this case, it is clear that the hiring decision at issue was not itself unconstitutional; it was made

within the dictates of Oklahoma state law and all existing constitutional doctrine. Respondent's deliberate indifference claim relating to hiring must fail because she did not establish, as required by this Court's decisions, either that the deprivation was a "morally certain" or "obvious" consequence of the hiring decision, or that respondent's hiring decisions had produced a pattern of similar incidents.

For similar reasons, respondent's failure to train claim, which was the second basis for liability in the district court, is also without merit. Petitioner did in fact train Burns in how to make forcible arrests. Thus, respondent's contention is that Burns' training was inadequate, as opposed to completely absent. To establish deliberate indifference under these circumstances, a plaintiff must, at a minimum, show a pattern of similar incidents. A pattern of incidents puts the municipality on notice of a problem in the training program and supports the conclusion that municipal policy rather than some alternative explanation is responsible for the deprivation. Because respondent failed to show any such pattern, her failure to train claim is meritless.

ARGUMENT

I. BRYAN COUNTY IS NOT SUBJECT TO SECTION 1983 LIABILITY FOR THE DECISION TO HIRE STACY BURNS

The court of appeals approved an unprecedented extension of municipal liability under 42 U.S.C. § 1983 for a single hiring decision by a municipal policymaker. Nothing in the Constitution or this Court's decisions proscribes the appointment of law enforcement personnel who have prior records of misdemeanor offenses.

In almost every State, a prior misdemeanor record does not disqualify a candidate from service as a police officer. *See* Appendix. With regard to arrests, this Court itself has stated that "[t]he mere fact that a man has been arrested has very little, if any, probative value in showing that he has engaged in any misconduct." *Schware v. Board of Bar Examiners*, 353 U.S. 232, 241 (1957). Even with regard to misdemeanor convictions, most States treat such convictions as simply a factor to be evaluated along with such other criteria as the results of emotional stability and psychological fitness examinations, polygraph examinations, oral interviews with the candidate and neighbors, and personal references. *See* Commission on Accreditation for Law Enforcement Agencies, *Standards For Law Enforcement Agencies* 32-2—32-3 (3d ed. 1994).[2]

The hiring decision thus involves an ad-hoc evaluation of diverse and inherently subjective criteria. These judgments should not be subjected to "an endless exercise of second-guessing" by the federal courts. *City of Canton v. Harris*, 489 U.S. 378, 392 (1989). Holding municipalities liable based on the wisdom of individual hiring decisions is fundamentally at odds with this Court's decisions establishing that such liability is only justified where municipal policy is the "moving force [behind] the constitutional violation." *Id.* at 389 (quoting *Monell v. New York City Dept. of Soc. Servs.*, 436 U.S. 658, 673 (1978); *Polk County v. Dodson*, 454 U.S. 312, 326 (1981)).

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[2] As a general rule, the States prohibit the employment as police officers of persons with felony convictions. *See* statutes cited in appendix.

A. An Otherwise Constitutional Hiring Decision Does Not Subject A Local Government To Liability Under § 1983 Unless It Was "Morally Certain" Or "Obvious" That It Would Cause The Violation Of Plaintiff's Constitutional Rights

This Court's section 1983 municipal liability jurisprudence has never wavered from the principle that a local government may not be held liable for the actions of their employees under the doctrine of *respondeat superior*. *See, e.g., City of Canton*, 489 U.S. at 388-92; *Pembaur v. City of Cincinnati*, 475 U.S. 469, 478-79 (1986); *City of Oklahoma City v. Tuttle*, 471 U.S. 808, 818 & n.5 (1985); *Monell*, 436 U.S. at 693-94. The decision of the court below is flatly at odds with these precedents. It threatens to expose municipalities to a flood of § 1983 suits grounded solely in the isolated acts of municipal employees and thus to eviscerate the well-established principle that a municipality (and its citizenry) "cannot be held liable *solely* because it employs a tortfeasor." *Id.* at 691.

A municipality can be held liable under section 1983 where the allegedly unconstitutional action "implements or executes a policy statement, ordinance, regulation, or decision officially adopted and promulgated by that body's officers." *Monell*, 436 U.S. at 690. The "policy" requirement ensures that a municipality is held liable only for "acts which the municipality has officially sanctioned or ordered." *Pembaur*, 475 U.S. at 480. It is legally insufficient for a plaintiff seeking to impose liability on a municipality to prove only that a municipal employee inflicted the injury. *See Monell*, 436 U.S. at 691-94.

In rejecting *respondeat superior* liability, the *Monell* Court emphasized that municipal liability is

permissible only if "action pursuant to official municipal policy of some nature caused a constitutional tort." 436 U.S. at 691. By its terms, section 1983 imposes liability on any person who "shall subject, or cause to be subjected" any person to a constitutional deprivation. In *Monell*, the Court held that this language does not permit municipalities to be held vicariously liable; instead, it imposes liability only where the municipality "under color of some official policy, 'causes' an employee to violate another's constitutional rights." 436 U.S. at 692 (quoting 42 U.S.C. § 1983). Thus, there must be a "direct causal link" between some official municipal action and the constitutional deprivation at issue. *City of Canton*, 489 U.S. at 385; *see also Tuttle*, 471 U.S. at 824 n.8 (plurality opinion) ("There must at least be an affirmative link between [the municipal policy] and the particular constitutional violation at issue.").

This Court has further held that there are two ways to satisfy these prerequisites to municipal liability. First, a municipal policy may itself be unconstitutional or may directly order or authorize a constitutional deprivation. *See Monell*, 436 U.S. at 660-61; *Pembaur*, 475 U.S. at 482 n.11. Second, a plaintiff may establish that the municipality was deliberately indifferent to his constitutional rights. *See City of Canton*, 489 U.S. at 388. Both of these lines of cases preserve this Court's commitment to the idea that the constitutional injury must directly result from conduct or willful inaction that represents municipal policy.

Unconstitutional Policies. The core circumstance for finding municipal liability is presented by a municipal policy that itself affirmatively authorizes the

constitutional wrong.[3] Where that is true, the connection between the policy and the harm is obvious. As a result, "[p]roof of a single incident of unconstitutional activity is . . . sufficient to impose liability under *Monell*" when "proof of the incident includes proof that it was caused by an existing unconstitutional municipal policy, which policy can be attributed to a municipal policymaker." *Tuttle*, 471 U.S. at 823-24 (plurality opinion).

Monell itself involved a facially unconstitutional municipal policy that compelled pregnant employees to take unpaid leaves of absence before they were medically required, in violation of *Cleveland Board of Education v. LaFleur*, 414 U.S. 632 (1974). *See Monell*, 436 U.S. at 660-62. Thus, the policy itself was unconstitutional. *See Tuttle*, 471 U.S. at 822 (plurality opinion); *see also Owen v. City of Independence*, 445 U.S. 622, 625-34 (1980) (legislative action in violation of *Board of Regents v. Roth*, 408 U.S. 564 (1972) and *Perry v. Sinderman*, 408 U.S. 593 (1972)).

In *Pembaur*, this Court extended *Monell* to hold that a single decision by a policymaker can be the basis for municipal liability when the decision orders or authorizes an unconstitutional act. 475 U.S. at 480. The *Pembaur* Court, however, reaffirmed *Monell*'s rejection of *respondeat superior* liability. 475 U.S. at 478-80.

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[3] A policy is a generally applicable rule promulgated by a municipal entity competent in such matters: " '[O]fficial policy' often refers to formal rules or understandings—often but not always committed to writing—that are intended to, and do, establish fixed plans of action to be followed under similar circumstances consistently and over time." *Pembaur*, 475 U.S. at 480-81.

In *Pembaur*, a city prosecutor directed law enforcement personnel to forcibly enter third party property in order to effect an arrest, in violation of *Steagald v. United States*, 451 U.S. 204 (1981). *See* 475 U.S. at 474. Like *Monell*, therefore, *Pembaur* involved a policy that itself violated the Constitution. In that circumstance, the Court held that a "policy which ordered or authorized an unconstitutional act can be established by a single decision by proper municipal policymakers." *Pembaur*, 475 U.S. at 482 n.11; *see also City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 250-52 (1981) (executive action by city council in violation of First Amendment).

Deliberate Indifference. In cases not involving facially unconstitutional policy, the argument for imposing municipal liability is considerably weaker. As Chief Justice Rehnquist has explained, where the plaintiff alleges only that a municipality failed to prevent its employees from violating the Constitution, "the 'policy' . . . is far more nebulous, and a good deal further removed from the constitutional violation, than was the policy in *Monell*." *Tuttle*, 471 U.S. at 822 (plurality opinion).

In *City of Canton*, this Court held that where the municipality has not adopted a facially unconstitutional policy, § 1983 can give rise to municipal liability only in "limited circumstances." *See* 489 U.S. at 387. Specifically, the Court held that a municipality's failure to train its employees can support municipal liability "only where the failure to train amounts to deliberate indifference to the rights of persons with whom the police come into contact." *Id.* at 388. The Court emphasized that because the deliberate indiffer-

ence standard must "reflect[] a 'deliberate' or 'conscious' choice by a municipality," even a showing of "gross negligence" is legally insufficient to support liability. *See id.* at 388-89 & n.7. Moreover, the Court stressed that application of the deliberate indifference standard must not "result in *de facto respondeat superior* liability." *Id.* at 392. *See also id.* at 394-95 (O'Connor, J., concurring in part and dissenting in part).

To prevent the deliberate indifference standard from degenerating into *de facto respondeat superior* liability, this Court in *City of Canton* adopted strict substantive and evidentiary principles to guide its implementation. As a substantive matter, the Court emphasized that deliberate indifference must reflect rigorous standards of both fault and causation.

With regard to fault, the Court stressed that the deliberate indifference standard requires a high degree of foreseeability that the acts or omissions of a municipal policymaker would result in a constitutional violation. *See* 489 U.S. at 389-90 ("it may happen that . . . the need for more or different training is so obvious, and the inadequacy so likely to result in the violation of constitutional rights, that the policymakers of the city can reasonably be said to have been deliberately indifferent"). Such a high degree of foreseeability is, as Justice O'Connor explained, necessary to avoid *de facto respondeat superior* liability:

> [T]he requisite degree of fault must be shown by proof of a background of events and circumstances which establish that the 'policy of inaction' is the functional equivalent of a decision by the city itself to violate the Constitution. Without some form of notice to the city, and the opportunity to conform to constitutional dictates both what it does and what it chooses not to do, the [deliberate indifference] theory of liability could completely engulf *Monell*, imposing liability without regard to fault.

489 U.S. at 394-95 (concurring in part and dissenting in part).

With regard to causation, the Court stressed repeatedly that there must be a "direct causal link" between the alleged municipal policy and a constitutional violation. 489 U.S. at 385; *see, e.g., id.* at 391 (alleged policy "must be closely related to the ultimate injury"); *see also id.* at 395 (O'Connor, J., concurring in part and dissenting in part) (policy must "bear a very close causal connection to the violation of constitutional rights"). Clearly, a showing of but-for causation is not enough. *See, e.g.*, 489 U.S. at 389 & n.9; *id.* at 393 (O'Connor, J., concurring in part and dissenting in part); *Tuttle*, 471 U.S. at 823 (plurality opinion). In the context of municipal liability, similarly strict causation requirements are also critical. *See City of Canton*, 489 U.S. at 391 ("To adopt lesser standards of fault and causation would open municipalities to unprecedented liability under § 1983.").

The deliberate indifference standard also imposes significant evidentiary obligations on plaintiffs attempting to establish municipal liability. The Court has long recognized that "some limitation must be placed on establishing municipal liability through policies that are not themselves unconstitutional, or the test set out in *Monell* will become a dead letter." *Tuttle*, 471 U.S. at 823 (plurality opinion). Thus,

> where the policy relied upon is not itself unconstitutional, considerably more proof than the single incident will be necessary in every case to establish both the requisite fault on the part of the municipality, and the causal connection between the "policy" and the constitutional deprivation.

Id. at 824 (footnote omitted).

In *City of Canton*, this Court recognized two types of proof that would suffice to establish deliberate indifference and therefore municipal liability. First, the plaintiff could prove to a "moral certainty" that the decision at issue would result in a constitutional violation. *See* 489 U.S. at 390 n.10. *See also id.* at 396 (O'Connor, J., concurring in part and dissenting in part) ("a municipality could fail to train its employees concerning a clear constitutional duty implicated in recurrent situations that a particular employee is certain to face").[4]

Second, a plaintiff could prove that the decision at issue already had produced a pattern of constitutional violations. As the Court explained, "[i]t could

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[4] As an example of this kind of proof, the Court cited a hypothetical failure to train police officers in the use of deadly force:

> For example, city policymakers know to a moral certainty that their police officers will be required to arrest fleeing felons. The city has armed its officers with firearms, in part to allow them to accomplish this task. Thus, the need to train officers in the constitutional limitations of the use of deadly force, see *Tennessee* v. *Garner*, 471 U.S. 1 (1985), can be said to be 'so obvious,' that failure to do so could properly be characterized as "deliberate indifference" to constitutional rights.

489 U.S. at 390 n.10.

also be that the police, in exercising their discretion, so often violate constitutional rights that the need for further training must have been plainly obvious to the city policymakers, who, nevertheless, are 'deliberately indifferent' to the need." *Id.* Thus, as Justice O'Connor confirmed, "municipal liability for failure to train may be proper where it can be shown that policymakers were aware of, and acquiesced in, a pattern of constitutional violations." *Id.* at 397 (O'Connor, J., concurring in part and dissenting in part).

The pattern requirement serves important functions. To begin with, it makes it very likely that the municipality's policymakers were on "notice" that its policies were inadequate to prevent constitutional violations. *See id.* at 395. *See also id.* at 397 ("a pattern of constitutional violations could put the municipality on notice that its officers confront the particular situation on a regular basis, and that they often react in a manner contrary to constitutional requirements"). Without such notice, there is no basis to conclude that the municipality's conduct reflected a "deliberate" or "conscious" indifference to the plaintiff's constitutional rights. 489 U.S. at 389.

Moreover, the pattern requirement also eliminates causes of constitutional violations for which the local government bears no responsibility. For example, a constitutional violation might be caused by the officer's malice toward the victim, a mistake, "an otherwise sound [training] program [which] has occasionally been negligently administered," or by an inadequate program. *City of Canton*, 489 U.S. at 391. The pattern requirement is thus integral to the Court's "admonition . . . that a municipality can be liable under § 1983 only where its policies are the

'moving force [behind] the constitutional violation.' " *Id.* at 389 (citations omitted). *See also City of Springfield v. Kibbe*, 480 U.S. 257, 268 (1987) (O'Connor, J., dissenting) (listing factors other than a municipality's deliberate indifference "that were equally likely to contribute or play a predominant part in bringing about the constitutional injury"). Absent any pattern of similar violations, the conclusion "in a particular instance" that training deficiencies caused an officer's unconstitutional conduct would rest on little more than impermissible "speculation and conjecture." *Id.*

Finally, this Court repeatedly has cautioned against adopting lesser standards of fault and causation. As the Court explained in *City of Canton*, "permitting cases against cities . . . to go forward" under legally deficient standards "would result in [imposing] *de facto respondeat superior* liability on municipalities —a result we rejected in *Monell*." 489 U.S. at 392. *See also id.* at 399 (O'Connor, J., concurring in part and dissenting in part) ("Allowing an inadequate training claim . . . to go to the jury based upon a single incident would only invite jury nullification of *Monell*."); *Tuttle*, 471 U.S. at 830-31 (Brennan, J., concurring in part and concurring in the judgment) (permitting improper jury inference of municipal "policy" would "unduly threaten [the city's] immunity from *respondeat superior* liability"). As shown below, these principles require reversal of the judgment of the court of appeals.

B. There Is No Basis For Imposing Section 1983 Liability On Bryan County Based On The Decision To Hire Stacy Burns

A single hiring decision, which is not itself unconstitutional, cannot give rise to municipal liability unless it reflects deliberate indifference to the constitutional rights that were violated. In this case, respondent cannot allege that Sheriff Moore's hiring decision was itself unconstitutional or was the result of a facially unconstitutional policy. Nor can it be said that it was so "obvious" at the time of Burns' hiring that he would commit Fourth Amendment violations as to establish the County's deliberate indifference.

In upholding the jury's deliberate indifference determination, the court of appeals relied heavily on the single-act decision in *Pembaur*. This case, however, is plainly unlike that decision. As explained above, in *Pembaur* the prosecutor who ordered the unconstitutional action was the local government's policymaker; the decision itself was facially unconstitutional. By contrast, Sheriff Moore's decision to hire a reserve deputy in no way ordered or authorized a constitutional deprivation. Precisely because Moore's decision to hire did not itself violate the Constitution, *Pembaur* is inapposite.

The Fifth Circuit also reasoned that Sheriff Moore's hiring decision "amounted to deliberate indifference to the public's welfare." Pet. App. 23a. This Court has made clear, however, that the operative standard requires a showing of deliberate indifference to a discrete and identifiable constitutional right, not to some generalized notion of the public welfare. *See, e.g., City of Canton*, 489 U.S. at 390-91.

As explained above, the deliberate indifference standard requires more than a showing that the constitutional violation was merely foreseeable; rather, it must be the "obvious" consequence of the hiring decision. *See id.* at 390 n.10. Indeed, given the ex-

tensive state standards governing the selection of law enforcement personnel, *see* statutes cited in Appendix, the recognition of a § 1983 cause of action for inadequate hiring should not be lightly given.

States have extensive minimum standards governing the selection of law enforcement personnel. *See* Appendix. These standards are designed to weed out those who are unfit to serve. Hiring decisions, however, also invariably involve the evaluation of various criteria besides prior records, including psychological tests, polygraph exams, and interviews of both the candidate and other persons. The hiring decision is thus an inherently subjective process. Undoubtedly, mistakes can be made. But such mistakes are commonly errors of judgment and do not reflect a "deliberate" or "conscious" choice to violate constitutional rights.

Moreover, human experience instructs that it is no easy matter to predict future behavior based on past records. If inadequate hiring is to be recognized as a theory of § 1983 liability, the standard of liability must account for the inherently subjective nature of the hiring process. To demonstrate, even if it were the case that well researched and accepted studies showed a substantial correlation between certain prior misdemeanor convictions and constitutional violations of the kind at issue here, each hiring decision is highly individualized; candidates are routinely interviewed and psychologically evaluated. To impose liability where a hiring decision was made after a good faith effort to determine a candidate's fitness for service would be inconsistent with the requirement that a local government not be held liable unless it has made a "conscious" or "deliberate" choice which was substantially likely to violate specific constitutional rights.

In any event, respondent has offered no such evidence. Indeed, respondent has not even offered evidence showing that Bryan County was on notice from its past hiring decisions that persons with records similar to Burns were substantially likely to commit the constitutional violations that occurred here. *See City of Canton*, 489 U.S. at 390 n.10; *Tuttle*, 471 U.S. at 824. Respondent thus falls far short of showing that it was "obvious" that the County's hiring decisions would cause the violation of her Fourth Amendment rights. 489 U.S. at 390 n.10. Accordingly, her inadequate hiring claim should be rejected.

II. RESPONDENT'S INADEQUATE TRAINING CLAIM IS WITHOUT MERIT BECAUSE SHE FAILED TO SHOW A PATTERN OF SIMILAR INCIDENTS

Respondent's inadequate training claim is also without merit.[5] Respondent does not allege that Bryan County totally failed to train Burns regarding the reasonable use of force in arrests. Moreover, respondent has failed to identify any respect in which Bryan County's training program was so inadequate as to make it substantially likely that her Fourth Amendment rights would be violated. Indeed, respondent does not allege that the existing training program has resulted in any discernible pattern of constitutional violations. Consequently, there is no basis for imposing liability on Bryan County.

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[5] Because the failure to train claim was neither resolved by the court of appeals nor encompassed within the questions presented here, this Court need not address it. In a superseded opinion, however, the court of appeals correctly rejected respondent's failure to train claim, as a matter of law, on the ground that she had not shown a pattern of similar incidents. 53 F.3d at 1424-25. In its final opinion, the court of appeals did not address the failure to train claim.

Respondent's failure to train claim is subject to all of the legal requirements set forth above. Among other things, respondent must show that Bryan County's alleged failure to train Burns reflects "deliberate indifference" to her constitutional rights, *City of Canton*, 489 U.S. at 389-90, and constitutes a "direct" cause of her constitutional injury. *Id.* at 385, 389. To establish deliberate indifference, moreover, respondent must prove either that the alleged failure to train would produce constitutional violations to a "moral certainty," *id.* at 390 n.10, or that the municipality's training policies had resulted in a "pattern" of similar constitutional violations adequate to put the County on "notice." *Id.* at 397 (O'Connor, J., concurring in part and dissenting in part).

In this case, the record is uncontroverted that Burns did receive significant training on how to make proper arrests. Tr. 577-83. In particular, Burns had attended the State of Oklahoma's Council on Law Enforcement Education and Training (CLEET) Program, and the Reserve Academy at Hugo, Oklahoma. Tr. 578. Moreover, Burns received extensive on-the-job training with fully certified deputy sheriffs. Tr. 580. Accordingly, this case involves not a complete failure to train, but rather an allegation that, in essence, the municipality has allocated inadequate resources to an existing training program. In this circumstance, a plaintiff can establish deliberate indifference only by demonstrating, as the Fifth Circuit originally held in this case, *see* 53 F.3d at 1425, that the existing training program has resulted in a pattern of constitutional violations.

Because respondent does not allege a complete failure to train and has not shown a pattern of constitutional violations, it was not obvious that the existing training policy would produce constitutional violations. While that conclusion might be justified, for example, where a municipality provides absolutely no training on the use of deadly force, *see City of Canton*, 489 U.S. at 390 n.10, a dramatically different situation is presented here where the allegation is that a training program *actually pursued* was merely inadequate. If, for example, a municipality decides to present two days of training on *Garner*, five days on search and seizure, one day on identifying drunk drivers, and so on, and the plaintiff alleges that the municipality's *Garner* training was inadequate, a single incident of deadly force should not suffice to support a finding of municipal liability. In this situation, where only one incident has been shown, it is clearly neither "obvious" nor "morally certain" that the training program is significantly deficient. Only a pattern of violations, therefore, can establish the requisite deliberate indifference under these circumstances.

In *City of Canton* itself this Court made clear that in the absence of a pattern of incidents, challenges to the scope of an existing program cannot support a finding of deliberate indifference. The Court explained: "Neither will it suffice to prove that an injury or accident could have been avoided if an officer had had better or more training, sufficient to equip him to avoid the particular injury-causing conduct." 489 U.S. at 391. Absent any pattern of constitutional violations, such claims would quickly devolve into a regime of *de facto respondeat superior* liability. As Justice O'Connor has explained: "Without some form of notice to the city, and the oppor-

tunity to conform to constitutional dictates both what it does and what it chooses not to do, the failure to train theory of liability could completely engulf *Monell*, imposing liability without regard to fault." *Id.* at 395 (O'Connor, J., concurring in part and dissenting in part). Moreover, absent a pattern of constitutional violations, claims such as respondent's would require federal judges and juries to closely scrutinize difficult resource allocation decisions—a result that *City of Canton* expressly sought to avoid. *See* 489 U.S. at 392 (Lower standard of proof "would also engage the federal courts in an endless exercise of second-guessing municipal employee-training programs. This is an exercise we believe the federal courts are ill-suited to undertake, as well as one that would implicate serious question of federalism.").

Finally, respondent has not even identified any respect in which Bryan County's existing training program was inadequate. Indeed, even if respondent could establish that Burns was inadequately trained, this alone would not show that the County's training program was inadequate. As this Court explained in *City of Canton*, "[t]hat a particular officer may be unsatisfactorily trained will not alone suffice to fasten liability on the city, for the officer's shortcomings may have resulted from factors other than a faulty training program." 489 U.S. at 390-91 (citations omitted). For all of these reasons, respondent has failed to establish the elements required to impose liability on the County for inadequate training.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

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June 21, 1996

APPENDIX

APPENDIX

SELECTED STATE LAWS WHICH DISQUALIFY LAW ENFORCEMENT OFFICER CANDIDATES ON THE BASIS OF CRIMINAL RECORD

I. STATES WHICH DISQUALIFY LAW ENFORCEMENT OFFICER CANDIDATES ON THE BASIS OF A FELONY CONVICTION

Alabama	Ala. Code § 36-21-46 (Michie Supp. 1995)
California	Cal. Gov't Code § 1029 (West 1995)
Kansas	Kan. Stat. Ann. § 74-5605 (Supp. 1995)
Maine	Code Me. R. § 227 ch. 3 (Weil 1995)
Massachusetts	Mass. Ann. Laws ch. 41, § 96A (Law. Co-op. 1993)
Michigan	Mich. Admin. Code r. 28.4102 (1979)
Minnesota	Minn. R. 6700.0700 (1993)
New York	N.Y. Town Law § 151 (McKinney Supp. 1996)
Ohio	Ohio Admin. Code § 109:2-1-03 (Baldwin 1995)
South Dakota	S.D. Admin. R. 55:02:14:02.01 (1995)
Virginia	Va. Code Ann. § 15.1-131.8 (Michie Supp. 1995)
Wisconsin	Wis. Admin. Code § LES 2.01 (1993)

II. STATES WHICH DISQUALIFY LAW ENFORCEMENT OFFICER CANDIDATES ON THE BASIS OF A FELONY CONVICTION OR SPECIFIC MISDEMEANOR CONVICTIONS

Alaska	Alaska Admin. Code tit. 13 § 85.010 (Michie Supp. 1996) (misdemeanors of dishonesty or moral turpitude; misdemeanors resulting in serious physical injury to another person; two or more D.W.I. offenses; certain drug offenses)

Arizona	Ariz. Admin. Code R13-4-105 (Supp. 1995) (certain drug offenses and a pattern of traffic violations showing disrespect for traffic laws and safety of others within last three years)
Colorado	Colo. Rev. Stat. § 24-31-304 (Bradford 1988) (crimes involving moral turpitude)
Connecticut	Conn. Agencies Regs. § 7-294e-16 (1995) (Class A or B misdemeanors)
Florida	Fla. Stat. Ann. § 943.13 (West Supp. 1996) (misdemeanors involving perjury or a false statement)
Georgia	Ga. Code Ann. § 92A-2108 (Harrison 1994) (crimes which could have resulted in imprisonment in a federal or state prison or misdemeanors showing a pattern of disregard for the law)
Illinois	Ill. Admin. Code tit. 5, § 1720.35 (Supp. 1993) (crimes of moral turpitude)
Indiana	Ind. Admin. Code tit. 250, r. 1-3-9 (1992) (crimes of moral turpitude)
Iowa	Iowa Admin. Code r. 501-2.1(80B) (1993) (crimes of moral turpitude)
Kentucky	502 Ky. Admin. Regs. 45:025 (1995) (crimes of moral turpitude)
Maryland	Md. Regs. Code tit. 12, § 04.01.01A (1993) (misdemeanors which could have resulted in imprisonment for one year or more)
Missouri	Mo. Ann. Stat. § 590.135 (Vernon Supp. 1996) (misdemeanors involving moral turpitude; certain drug offenses)
Montana	Mont. Code Ann. § 7-32-303 (1993) (crimes which could have resulted in imprisonment in a federal or state penitentiary)
Nebraska	Neb. Rev. Stat. § 81-1410 (1994) (crimes which could have resulted in imprisonment in a penitentiary for one year or more; D.W.I. within two years of hire)

New Jersey	N.J. Stat. Ann. § 40A:14-22 (West 1993) (crimes involving moral turpitude)
New Mexico	N.M. Stat. Ann. § 29-7-6 (Michie 1994) (crimes involving moral turpitude, aggravated assault, theft, D.W.I., or drug offenses within three years of hire)
North Carolina	N.C. Admin. Code tit. 12, r. 9B.0111 (Barclay Supp. 1995) (crimes which could have resulted in imprisonment for two years or more; Class B misdemeanors within 5 years of hire; more than three Class B misdemeanors overall; more than three Class A misdemeanors if any occurred within two years prior to hire)
Oklahoma	Okla. Stat. Ann. tit. 70, § 3311 (West Supp. 1996) (crimes involving moral turpitude)
Oregon	Or. Admin. R. 259-08-010 (1991) (perjury-related, sex, drug-related or pornography offenses)
Pennsylvania	Pa. Stat. Ann. tit. 53, § 774 (Purdon Supp. 1996) (serious misdemeanors)
Rhode Island	22 R.I. Admin. Code r. 96-080-01 (1992) (crimes involving moral turpitude)
South Carolina	S.C. Code Ann. § 23-23-50 (1989) (D.U.I. or leaving the scene of an accident within five years of hire)
Tennessee	Tenn. Code Ann. § 38-8-106 (Michie 1991) (crimes involving force, violence, theft, dishonesty, gambling, liquor or controlled substances)
Texas	Tex. Admin. Code tit. 37, § 211.80 (West 1996) (Class A misdemeanors within one year of hire; Class B misdemeanors within six months of hire; D.U.I. or D.W.I. within two years of hire; or on probation for Class A or B misdemeanor)
Utah	Utah Code Ann. § 53-6-203 (Michie 1994) (crimes which would have resulted in imprisonment in a state or federal penitentiary)

Vermont	Code of Vt. R. 80 070 001-17 (Weil 1994) (crimes involving moral turpitude)
Washington	Wash. Admin. Code § 139-05-220 (1995) (gross misdemeanors or misdemeanors involving moral turpitude or for which imprisonment in a federal or state penitentiary could have been imposed)
Wyoming	Wyo. Stat. Ann. § 9-1-704 (Michie 1995) (crimes which could have resulted in imprisonment in a federal penitentiary or state prison)

III. STATES WITHOUT DISQUALIFICATION STANDARDS FOR LAW ENFORCEMENT OFFICER CANDIDATES

Idaho	Idaho Admin. Code § 11.11.01.056 (Supp. 1995) (Peace Officer Standards and Training Council shall pass judgment individually on each applicant)
North Dakota	N.D. Cent. Code § 12-63-12 (Michie Supp. 1995) (crime determined by peace officer standards and training board to have a direct bearing on an individual's ability to perform the duties of a police officer)

No. 95-1100

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1995

THE BOARD OF THE COUNTY COMMISSIONERS
OF BRYAN COUNTY, OKLAHOMA,
Petitioner,

v.

JILL BROWN, *et al.*,
Respondents.

ON WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF OF WASHINGTON LEGAL FOUNDATION AND ALLIED EDUCATIONAL FOUNDATION AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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QUESTIONS PRESENTED

1. Does 42 U.S.C. § 1983 create a cause of action against a municipality based on a single hiring decision, where the hiring decision is not part of a consistently-applied hiring policy?

2. Does 42 U.S.C. § 1983 create a cause of action against a municipality based on a demonstrated willingness to hire those with misdemeanor conviction records, in the absence of evidence that such willingness is affirmatively linked to a deprivation of constitutional rights?

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INTERESTS OF THE *AMICI CURIAE*

The Washington Legal Foundation (WLF) is a non-profit public interest law and policy center with supporters in all 50 states. While WLF engages in litigation and the administrative process in a variety of areas, WLF devotes a substantial portion of its resources to promoting civil justice reform, including tort reform. To that end, WLF has appeared before this Court as well as other federal and state courts to argue against overly expansive theories of

tort liability, excessive punitive damages, and imposition of unwarranted attorney fee awards against municipalities and other defendants. *See, e.g., BMW of North America, Inc. v. Gore*, 116 S. Ct. 1589 (1996); *City of Burlington v. Dague*, 505 U.S. 557 (1992).

The Allied Educational Foundation (AEF) is a non-profit charitable and educational foundation based in Englewood, New Jersey. Founded in 1964, AEF is dedicated to promoting education in diverse areas of study, such as law and public policy, and has appeared as *amicus curiae* in this Court on a number of occasions.

WLF and AEF believe that despite this Court's admonition in *Monell v Dept. of Social Services*, 436 U.S. 658 (1978), that 42 U.S.C. § 1983 does *not* impose strict liability on municipalities for the wrongful acts of their employees, the lower courts increasingly are enforcing that statute as though it does. The result is that in virtually *every* § 1983 suit involving an individual injured by a municipal employee, the municipality is named as a defendant, and taxpayers across the nation are being forced to fund the often exorbitant awards being given to plaintiffs and their contingent-fee attorneys. WLF and AEF believe that it is important for the Court to establish bright-line tests that will make municipal liability the exception rather than the rule in cases involving alleged misconduct by municipal employees.

Amici submit this brief in support of Petitioner with the written consent of both parties. The written consents are on file with the Clerk of the Court.

STATEMENT OF THE CASE

In the interests of judicial economy, *amici* hereby adopt by reference the Statement of the Case set forth in Petitioner's brief.

This case involves an attempt to impose liability on a municipality based on the conduct of one of its employees, a Reserve Deputy Sheriff found by a jury to have used excessive force in removing a passenger (Respondent Jill Brown) from a motor vehicle. At issue is whether Congress -- in adopting § 1 of the Ku Klux Klan Act of 1871, 42 U.S.C. § 1983 -- intended to create a cause of action against a municipality under the facts of this case.

Mrs. Brown was a passenger in a truck being driven by her husband in the early hours of May 12, 1991 when the truck approached a police checkpoint in Bryan County, Oklahoma. Not wishing to pass through the checkpoint, Mr. Brown turned the truck around and drove off in the opposite direction. Two Bryan County law enforcement officers, Deputy Sheriff Robert Morrison and Reserve Deputy Stacy Burns, pursued the truck for several miles before successfully pulling it over. By that time, the truck had crossed the border from Oklahoma into Grayson County, Texas.

Burns and Morrison then exited their squad car and approached the Browns' vehicle, with Burns coming to the passenger side. After twice ordering Mrs. Brown from the vehicle, Burns pulled her from her seat and dropped her to the ground. Petition Appendix ("Pet. App.") 5a. Mrs. Brown's impact with the ground caused severe injury to her knees. *Id.* Burns thereafter handcuffed Mrs. Brown for at

least 30 minutes, although she was never charged with any crime.

Mrs. Brown filed suit under 42 U.S.C. § 1983 in U.S. District Court for the Eastern District of Texas against Burns, Morrison, Bryan County Sheriff B.J. Moore, and the Board of the County Commissioners of Bryan County, Oklahoma ("Bryan County"). She alleged that Burns's actions in forcibly removing her from a vehicle and handcuffing her for an extended period of time violated her rights under the Fourth, Fifth, Eighth, and Fourteenth Amendments to the Constitution. She alleged that Bryan County violated her constitutional rights by hiring Burns and failing to train him adequately.

Following a trial, the jury found against Burns and Bryan County but in favor of Defendants Morrison and Moore. It found that Burns had used excessive force in pulling Mrs. Brown from her vehicle, had falsely imprisoned Mrs. Brown, and was not entitled to a good-faith immunity defense. The jury also found that "the hiring policy of Bryan County in the case of Stacy Burns" and "the training policy of Bryan County in the case of Stacy Burns" were "so inadequate as to amount to deliberate indifference to the constitutional needs" of Mrs. Brown. Based on that verdict, the district judge entered judgment against Burns and Bryan County for $711,302, plus punitive damages and attorney fees.

The U.S. Court of Appeals for the Fifth Circuit affirmed the district court judgment by a 2-1 vote. The appeals court recognized that § 1983 permits imposition of a damage award against a municipality only where the plaintiff's constitutional rights have been violated pursuant to some municipal policy. However, the court said, "it is

clear that a single decision" may constitute the requisite municipal policy and thus "may create municipal liability *if* that decision were made by a final policymaker responsible for that activity." Pet. App. 18a. The Court concluded that since Bryan County had given Sheriff Moore policymaking authority to hire Burns, Moore's decision to hire Burns constituted county "policy" for purposes of § 1983 liability. *Id.*

The appeals court also upheld, without extensive discussion, the jury's determination that Mrs. Brown's injuries were *caused* by Bryan County's allegedly inadequate hiring policy. Pet. App. 24a ("the jury could find that hiring an unqualified applicant and authorizing him to make forcible arrests actually caused the injuries suffered by Mrs. Brown.").

The Fifth Circuit did not consider Mrs. Brown's alternative cause of action -- that her injuries were caused by Bryan County's constitutionally deficient *training* policy for its deputy sheriffs.

Judge Emilio M. Garza dissented from that portion of the panel's decision imposing liability on Bryan County. Pet. App. 26a-29a. He argued that a single negligent hiring decision, such as the decision to hire Burns, cannot constitute an "unconstitutional municipal policy" for purposes of imposing liability under § 1983. *Id.* at 26a. He wrote, "Where the policymaker's decision does not *directly* 'order' or 'authorize' the constitutional violation, something more than a single decision is required in order to find that this decision in fact constitutes 'municipal policy,' such that we can hold the county liable." *Id.* at 28a-29a.

The Court granted Bryan County's certiorari petition on April 22, 1996, to review the Fifth Circuit's decision that § 1983 liability could be imposed on Bryan County based on its decision to hire Burns and authorize him to make forcible arrests.

SUMMARY OF ARGUMENT

In seeking to impose liability on Bryan County based on its decision to hire Reserve Deputy Burns, Mrs. Brown is attempting to expand the definition on municipal "policy" beyond all reasonable bounds. Such an expansion would effectively constitute adoption of a *respondeat superior* theory of liability, a theory of liability expressly rejected by Congress when it adopted 42 U.S.C. § 1983.

Amici propose the following alternative rule. A single decision by a municipal policymaker does not constitute municipal "policy" actionable under § 1983 unless: (1) the decision carries out what has been understood to be an existing, albeit unofficial, standard operating procedure; or (2) there is some contemplation that the decision has established a precedent that the municipality will follow if and when it again faces the same set of circumstances. When the decision being challenged is not itself unconstitutional, the Court should be particularly reluctant to adopt any rule of liability broader than that outlined above.

Mrs. Brown's cause of action should fail for the additional reason that she has failed to establish an "affirmative link" between Petitioner's decision to hire Burns and her subsequent injury. Indeed, *amici* doubt that a § 1983 plaintiff could ever establish that a deficient hiring policy was the "moving force" behind subsequent police misconduct. For that reason, *amici* urge the Court to

declare that allegedly deficient hiring policies cannot serve as a predicate for municipal liability under § 1983. Moreover, principles of federalism dictate that the federal courts refrain from becoming too deeply involved in municipal hiring policies.

ARGUMENT

I. A SINGLE HIRING DECISION CANNOT CONSTITUTE MUNICIPAL "POLICY" FOR PURPOSES OF IMPOSING § 1983 LIABILITY

A. A Single Decision by Municipal Officials Does Not Constitute "Policy" Unless There Is Some Contemplation that the Same Decision Will Be Repeated Should the Municipality Be Faced with a Similar Situation.

When the Court in *Monell* overruled prior precedent and held for the first time that municipalities are "persons" subject to damages liability under 42 U.S.C. § 1983,[1] it made clear that it was not opening the floodgates to actions premised on the mere fact that the municipality employed an alleged wrongdoer. Rather, municipal liability could

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[1] 42 U.S.C. § 1983 provides, in relevant part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . ., subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. . . .

only be imposed for injuries inflicted pursuant to government "policy or custom." *Monell*, 436 U.S. at 694.

In seeking to impose liability on Bryan County based on its decision to hire Reserve Deputy Burns, Mrs. Brown is attempting to expand the definition of a municipal "policy" beyond all reasonable bounds. If a single hiring decision could constitute actionable municipal "policy," then virtually any government action would so qualify, and the *respondeat superior* theory of liability warned against by *Monell* for § 1983 cases would become a reality.

Mrs. Brown's argument that a single hiring decision can constitute municipal policy actionable under § 1983 is based on a misreading of the Court's decision in *Pembaur v. City of Cincinnati*, 475 U.S. 469 (1986). *Pembaur* involved a § 1983 action brought by a doctor against several municipalities after law enforcement officers (in violation of his Fourth and Fourteenth Amendment rights) broke open his office door in order to serve capiases on two employees of the doctor who had failed to respond to grand jury subpoenas. The officers acted after: (1) being refused entrance by the doctor; (2) calling the prosecutor's office for advice; and (3) being instructed by the County Prosecutor to break open the door. *Pembaur*, 475 U.S. at 472-73.

The Court held that the decision to break open the office door constituted actionable municipal "policy" within the meaning of § 1983. The Court said:

> [I]t is plain that municipal liability may be imposed for a single decision by municipal policymakers under appropriate circumstances. . . . [W]here action is directed by those who establish governmental policy, the municipality is equally responsible whether that action is to be taken only once or to be taken repeatedly. . . . We hold that municipal liability under § 1983 attaches where -- and only where -- a deliberate choice to follow a course of action is made from among various alternatives by the official or officials responsible for establishing final policy with respect to the subject matter in question.

Id. at 480, 481, 483-84.

Since the decision to break down the doctor's door was made at the highest level of municipal decisionmaking, and since that decision appeared to be consistent with municipal actions in similar situations (the Prosecutor's office appeared to consider it standard procedure to use forcible entries, if necessary, to serve capiases), the Court had no occasion in *Pembaur* to consider at length the types of municipal actions that could qualify as § 1983 "policies." However, two of the concurring opinions (those of Justices White and O'Connor) included language that significantly limited the definition of "policy."[2] Justice White premised his concurrence on Cincinnati's concession that "forcible entry of third-party property to effect otherwise valid arrests was standard operating procedure." *Id.* at 485

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[2] Those two concurring opinions must be taken into account in determining *Pembaur*'s scope, because Justices White and O'Connor provided the majority with the necessary fifth and sixth votes. Justice O'Connor concurred in the judgment but did not join those portions of the Court's opinion that discussed when actions by municipal officials could constitute a municipal "policy" for § 1983 purposes. *Pembaur*, 475 U.S. at 491 (O'Connor, J., concurring in part and concurring in the judgment). Justice White, while concurring in the Court's opinion, made clear that he did so with the understanding that the opinion did not encompass a broader definition of § 1983 "policy" than is outlined in his concurring opinion. *Id.* at 485-87 (White, J., concurring).

(White, J., concurring). He pointedly stated, moreover, that the fact that Cincinnati's standard operating procedure constituted a § 1983 "policy" "does not mean that every act of municipal officers with final authority to effect or authorize arrests and searches represents the policy of the municipality." *Id.* at 486. While concurring in the judgment, Justice O'Connor explicitly concurred in Justice White's rationale and added, "I fear that the standard the majority articulates may be misread to expose municipalities to liability beyond that envisioned by the Court in *Monell*." *Id.* at 491 (O'Connor, J., concurring in part and concurring in the judgment).

Pembaur, then, can be understood as endorsing the proposition that *only sometimes* does a single decision by municipal policymakers constitute a municipal "policy" actionable under § 1983. While a single decision made by policymakers pursuant to an unofficial "standard operating procedure" was found sufficient to create an actionable municipal "policy" in *Pembaur*, it does not follow (as argued by Mrs. Brown) that a § 1983 "policy" is created by *every* decision made by a municipal official authorized to make such decisions.

Indeed, such a rule would lead to absurd results. For example, police officers are routinely authorized by their employers to conduct searches of private property. While they generally are warned not to engage in searches prohibited by the Fourth Amendment, the infinite variety of fact patterns that police officers routinely confront when attempting to determine whether searches are appropriate, as well as the complexity of Fourth Amendment case law, means that officers cannot reasonably be expected to know in advance whether their actions will later be found to violate Fourth Amendment rights. Thus, to hold that a

police officer creates municipal "policy" every time (s)he conducts a search not absolutely forbidden by existing case law would be, in effect, to impose *respondeat superior* liability on a municipality for virtually all actions of its police officers. *See* K. Lewis, *Section 1983: A Matter of Policy*, 70 MICH. BAR J. 556, 558 (1991)("If the mere exercise of discretion by an employee could give rise to a constitutional violation, the result would be indistinguishable from *respondeat superior* liability.").

A far more reasonable rule -- and one more in line with the understanding of § 1983 expressed in *Monell* -- would hold that a single decision by a municipal policymaker does not constitute a municipal "policy" actionable under § 1983 unless: (1) the decision carries out what has been understood to be an existing, albeit unofficial, standard operating procedure; or (2) there is some contemplation that the decision has established a precedent that the municipality will follow if and when it again faces the same set of circumstances.

Under the rule proposed here, Bryan County's decision to hire Reserve Deputy Sheriff Burns cannot constitute a municipal "policy" actionable under § 1983. Mrs. Brown alleges that her injuries were caused by Bryan County's decision to hire Burns, a hiring decision she describes as "so inadequate as to amount to deliberate indifference to the constitutional rights of citizens." Respondent's Opposition Brief at 6. Yet, nowhere does Mrs. Brown allege that such deliberate indifference was standard operating procedure in Bryan County or that Bryan County contemplated employing similar indifference in future hiring

decisions.[3] In the absence of such allegations, Mrs. Brown cannot establish that Bryan County had adopted a "policy" of "deliberate indifference to the constitutional rights of citizens," actionable under § 1983. *See* P. Kelly, *Deliberate Indifference: A Heightened Standard for Municipal Liability*, 19 COLO. LAW. 861, 862 (1990)("[D]eliberate indifference claims that are supported by conclusory or single incident allegations are subject to a motion to dismiss for failure to state a claim.").

In upholding imposition of § 1983 liability on Bryan County based on a single hiring decision, the Fifth Circuit relied on Bryan County's stipulation that Sheriff Moore had been granted final policymaking authority regarding all hiring and firing decisions within the Sheriff's Department. Pet. App. 16a. But simply because he acted within his delegated authority in hiring Burns does not mean that Sheriff Moore had authority to establish all county *policy* with respect to employment practices within his department. Indeed, the record clearly shows that he did *not* have such broad authority; for example, he was prohibited under Oklahoma law from hiring a deputy without first establishing that: (1) the Oklahoma State Bureau of Investigation and the FBI have reported that the applicant "has no record of a conviction of a felony or a crime involving moral turpitude"; (2) the applicant has undergone a psychological evaluation and has been found "suitable to serve as a peace officer"; and (3) the applicant is a high

[3] Indeed, the "deliberate indifference" issue was presented to the jury with a sole focus on the decision to hire Burns. The jury was asked to determine whether "the hiring policy of Bryan County *in the case of Stacy Burns* was so inadequate as to amount to deliberate indifference to the constitutional needs of the plaintiff." Pet. at 5 (emphasis added).

school graduate. Okla. Stat. Ann., tit. 70, § 3311 (West 1994). Nor did the appeals court suggest that Sheriff Moore had been delegated authority to establish a hiring policy in conflict with the numerous personnel policies established by the Oklahoma legislature and/or the Board of the County Commissioners -- such as the prohibition against hiring on the basis of race. Accordingly, the Court should be particularly reluctant to approve imposition of § 1983 liability on the basis of a "policy" applicable only to a single hiring decision made by a municipal employee whose "policymaking" authority consisted of little more than the authority to make hiring decisions in accordance with state and local law.

Indeed, the Court strongly suggested in *Pembaur* that a municipal employee does *not* make "policy" for purposes of § 1983 merely by virtue of exercising final authority over individual hiring and firing decisions. Rather, the Court indicated, the § 1983 "policy" consists in that instance of establishing an overall employment policy applicable to *all* hiring and firing decisions:

> The fact that a particular official -- even a policymaking official -- has discretion in the exercise of particular functions does not, without more, give rise to municipal liability based on an exercise of that discretion. See, *e.g.*, *Oklahoma City v. Tuttle*, 471 U.S. [808], 822-824 [(1985)]. The official must also be responsible for establishing final government policy respecting such activity before the municipality can be held liable. . . .
>
> **12.** Thus, for example, the County Sheriff may have discretion to hire and fire employees without also being the county official responsible for establishing

> county employment policy. If this were the case, the Sheriff's decisions respecting employment would not give rise to municipal liability, although similar decisions with respect to law enforcement practices, over which the Sheriff *is* the official policymaker, *would* give rise to municipal liability. Instead, if county employment policy was set by the Board of County Commissioners, only that body's decisions would provide a basis for county liability. *This would be true even if the Board left the Sheriff discretion to hire and fire employees and the Sheriff exercised discretion in an unconstitutional manner; the decision to act unlawfully would not be a decision of the Board.*

Pembaur, 475 U.S. at 482-83 & n.12 (final emphasis added). In other words, the Court indicated that hiring "policy" for purposes of § 1983 consists of rules generally applicable to all new hires, not to decisions to hire particular individuals.

Despite ruling against Bryan County, the district judge appeared to agree that Sheriff Moore should not be viewed as a policymaker merely by virtue of his hiring/firing authority. In rejecting Bryan County's argument that it should be shielded from liability under the Oklahoma Tort Claims Act (which exempts Oklahoma municipalities from state-law claims resulting from "performance of or the failure to exercise or perform any act or service which is in the discretion of the state or political subdivision or its employees"), the district court stated that the county was ineligible for that defense because Sheriff Moore's decision to hire Burns was a "ministerial" act, not a "policy or planning decision." Pet. App. 33a-34a.[4] The same rationale that dictated rejection of Bryan County's Oklahoma Tort Claims Act defense counsels against a finding that Sheriff Moore's decision to hire Burns should be deemed a "policy" for purposes of imposing § 1983 liability.

It bears repeating that Mrs. Brown is challenging Bryan County's "policy" in hiring Burns, not the Sheriff Department's overall hiring record. Even the Fifth Circuit conceded that any inadequacy in Sheriff Moore's background check of Burns before hiring him was atypical of Moore's normal practice. The appeals court said: "It is certainly true that the Sheriff had conducted adequate background checks on other deputies and assured himself that they were certified before putting them on the street." Pet. App. 24a n.22. *Pembaur* makes clear that such a challenge to a single hiring decision does not rise to the level of a challenge to a § 1983 "policy."

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[4] The district court's comments came in connection with its September 1993 denial of Petitioner's motion for judgment notwithstanding the verdict. The district judge explained his rationale as follows:

> Oklahoma has adopted the planning operational approach [to discretionary functions exception claims], whereby initial policy or planning decisions are discretionary, and thus exempt, while operational decisions made in the implementation and performance of the policy in specific instances are ministerial. The evidence in this case shows that the initial formulation of the policy to be followed in the selection of reserve deputy sheriffs and the training to be given reserve deputy sheriffs before placing them on duty at driver's license checkpoints was discretionary, but Sheriff Moore performed a ministerial act when he selected Stacy Burns and when he placed him on duty as a reserve deputy sheriff.

Id.

Amici suggest in passing that one reason for the apparent confusion within the lower federal courts on this issue is the confusion of terminology in § 1983 municipal liability cases. Section 1983 does not itself use the term "policy." Rather, it addresses actions under color of any "statute, ordinance, regulation, custom, or usage" of a State or municipal government. *Monell,* on the other hand, speaks in terms of municipal liability for injuries inflicted pursuant to government "policy or custom" (*Monell*, 436 U.S. at 694), suggesting that "policy" is shorthand for a formalized "statute, ordinance, [or] regulation" while "custom" is a shorthand for an informal "custom and usage" which, while never formally endorsed by decision-makers, has been tacitly accepted as standard operating procedure. Later decisions of this Court seem to use the term "policy" to cover all of the terms enumerated in § 1983. *See, e.g., City of Canton v. Harris,* 489 U.S. 378 (1989). *Amici* respectfully suggest that there is no principled distinction among the various terms used; they all refer to some sort of government policy, whether or not that policy is in writing or has ever been formalized. Yet, the continued use of *Monell*'s "policy or custom" terminology has led to confusion and has led many to conclude (erroneously, we believe) that "policy" suits and "custom" suits are wholly separate causes of action entailing different elements of proof. *See* L. Kramer and A. O'Sykes, *Municipal Liability Under § 1983: A Legal and Economic Analysis,* 6 SUP. CT. REV. 249, 254-55 (1987) (Court has established vague categories of municipal liability "susceptible to many plausible definitions").

Respondent's brief well illustrates that confusion. In opposing Petitioner's argument that a single hiring decision cannot constitute a § 1983 "policy," Mrs. Brown asserts:

> Petitioner's confusion may be attributable to a failure to recognize the difference between a *Monell* "policy" and a *Monell* "custom." . . . [A]lthough a plaintiff pursuing municipal liability based on a municipal "custom" must show "persistent and widespread" practices resulting in deprivations of constitutional rights, this Court in *Pembaur* quite clearly ruled that a municipal "policy" is established by a single decision made by a municipal policymaker on a matter within his policy-making authority. 475 U.S. at 480-481. And the § 1983 plaintiff in the present case never argued that Bryan County had a "custom" of hiring persons whose criminal records demonstrated them wholly inadequate to be law enforcement officers. This is a "policy" case, not a "custom" case.

Respondent's Opposition Brief at 19-20.

Amici do not believe that the Court in *Monell* and *Pembaur* intended to create differing elements of proof for "policy" and "custom" causes of action. In both instances, the determinative issue is the role of municipal policymakers in actions leading to the plaintiff's injuries. While the Court has recognized various methods by which plaintiffs are permitted to prove that municipal policymakers played such a role, the underlying cause of action is the same in each instance. *Amici* suggest that the Court clear up the underlying confusion in this area by henceforth using only the word "policy" to cover all of the government actions enumerated in § 1983 ("statute, ordinance, regulation, custom, or usage") and making clear that there is only a single municipal liability cause of action under § 1983.

In sum, a single decision by a municipal official does not constitute "policy" for purposes of § 1983 liability

unless that decision carries out what has been understood to be an existing, albeit unofficial, standard operating procedure, or unless there is some contemplation that the decision has established a precedent that the municipality will follow if and when it again faces the same set of circumstances. In the absence of evidence that the circumstances that led to Burns's hiring had occurred previously or were likely to be duplicated, the jury verdict for Mrs. Brown cannot stand.

B. When the Decision by Municipal Officials Being Challenged Is Not Itself Unconstitutional, the Court Should be Particularly Reluctant to Impose Municipal Liability in the Absence of Evidence that the Decision Is Part of a Recurring Policy.

Amici submit that the definition of "policy" proposed in the preceding section should be adopted in all cases -- even when the decision under challenge is itself unconstitutional. Thus, if it had been Sheriff Moore himself who had pulled Mrs. Brown from her vehicle and if she had premised her municipal liability claim on his actions, those actions would not constitute Bryan County "policy" unless Mrs. Brown could make the showings outlined above.

Nonetheless, as Judge Emilio Garza argued in his dissent below, courts should be particularly cautious in finding a "policy" actionable under § 1983 when (as here) the alleged policy is not itself unconstitutional. Pet. App. 26a-29a. As Judge Garza noted, the Court in *Tuttle* insisted that "considerably more proof than a single incident will be necessary" in order to establish that the decision of a municipal official is municipal "policy" actionable under § 1983, where the decision relied on "is not itself

unconstitutional." *Tuttle*, 471 U.S. at 824 (plurality opinion).[5]

In every case in which a plaintiff whose constitutional rights have been violated seeks to impose liability on a municipality under § 1983, the key issue is whether the violation is fairly attributable to the municipality. Certainly, such attribution is reasonable where the unconstitutional conduct was taken pursuant to a municipal policy that expressly mandated such conduct. But where the municipality has not, through some policy edict, directed its employees to engage in conduct that violates the plaintiff's constitutional rights, any effort to hold the municipality liable for such conduct treads perilously close to *respondeat superior* liability -- a standard of liability rejected by *Monell*. *Monell*, 436 U.S. at 691.

Moreover, holding municipalities liable under § 1983 for conduct which policymakers did not authorize is not easily squared with the commonly understood meaning of the word "policy." As the Court recognized in *Tuttle*, "the word 'policy' generally implies a course of action con-

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[5] Indeed, the Court in *Tuttle* made clear that it was still an open question "whether a policy that itself is not unconstitutional, such as the general 'inadequate training' alleged here, can ever meet the 'policy' requirement of *Monell*." *Id.* at 824 n.7. The Court subsequently reached that question in *City of Canton*, holding that "the inadequacy of police training may serve as the basis for § 1983 liability only where the failure to train amounts to deliberate indifference to the rights of persons with whom the police come into contact." *City of Canton*, 489 U.S. at 388. But the Court's opinion said nothing that undercut *Tuttle*'s continued vitality; indeed, the Court reinforced the considerably-more-proof-than-a-single-incident requirement by stating, "That a particular officer may be unsatisfactorily trained will not alone suffice to fasten liability on the city." *Id.* at 390.

sciously chosen from among various alternatives." *Tuttle*, 471 U.S. at 823 (plurality opinion). It is thus difficult to accept the notion that an inadequate hiring process (which suggests more a failure to take action than a consciously chosen course of action) could constitute a municipal policy. *City of Canton* held that a "policy" of deliberately choosing an inadequate training program could be deemed to exist in extreme circumstances -- where the training is so inadequate as to amount to "deliberate indifference to the rights of persons with whom the police come into contact." *City of Canton*, 489 U.S. at 388. Assuming for the sake of argument that a police hiring policy could be so inadequate as to satisfy a similar "deliberate indifference" standard, only the most grossly deficient hiring policies could be so described. Thus, unless the "deliberate indifference" exception is going to be allowed to swallow the general rule that a "policy" entails a consciously chosen course of action, only hiring practices involving a significant number of hiring decisions could qualify as "deliberately indifferent" hiring policies.

Pembaur is not to the contrary. *Pembaur* involved unconstitutional conduct that had been expressly authorized at the highest levels of municipal government; under those circumstances, even a single incident of such conduct could be said to been brought about as a result of the conscious choice of municipal policymakers. But it makes no sense to assert that a sheriff's allegedly deficient judgment in a single hiring decision constitutes a conscious decision to expose citizens to constitutional violations, particularly where (as here) the evidence indicates that most job applicants were thoroughly screened.

In sum, regardless whether a § 1983 "policy" can ever be created by a single decision whose repetition is not

contemplated, there certainly can be no such "policy" where the alleged policy relied on by the plaintiff is not itself unconstitutional. Since Bryan County's decision to hire Burns cannot be deemed unconstitutional, Mrs. Brown cannot establish the requisite municipal "policy" based solely on Sheriff Moore's decision to hire Burns.

II. RESPONDENT HAS FAILED TO ESTABLISH AN "AFFIRMATIVE LINK" BETWEEN PETITIONER'S DECISION TO HIRE BURNS AND HER SUBSEQUENT INJURY

In order to recover damages from Bryan County in this § 1983 action, Mrs. Brown must demonstrate not only the existence of a municipal "policy" but also that the identified policy *caused* her injuries. *Monell*, 436 U.S. at 692 ("Congress did not intend § 1983 liability to attach where such causation was absent."). Mrs. Brown has utterly failed to establish such causation.

Proving causation in a § 1983 action entails far more than establishing that the plaintiffs' injury would not have occurred *but for* the identified municipal "policy" (in this case, the decision to hire Burns). As the Court noted in *Tuttle*, imposing a mere *but for* causation requirement would be no requirement at all, because:

> Obviously, if one retreats far enough from a constitutional violation some municipal "policy" can be identified behind almost any such harm inflicted by a municipal official; for example, [the Oklahoma City police officer] would never have killed Tuttle if Oklahoma City did not have a "policy" of establishing a police force.

Tuttle, 471 U.S. at 823 (plurality opinion). The Court rejected that approach to proving causation on the ground that "[s]uch an approach provides a means for circumventing *Monell*'s limitations altogether." *Id.*

The Court opted instead to require "an affirmative link between the policy and the particular constitutional violation alleged." *Id.* Where, as here, "the policy relied upon is not itself unconstitutional, considerably more proof than [a] single incident will be necessary in every case to establish . . . the causal connection between the 'policy' and the constitutional deprivation." *Id.* at 824. The Court required a showing not merely that the challenged policy was "likely" to lead to generalized police misconduct but that the policy was the "moving force" behind the constitutional deprivation suffered by the plaintiff and that the two were "affirmatively linked." *Id.* at 824 n.8.

The Court reaffirmed in *City of Canton* that § 1983 plaintiffs face an exacting causation requirement in municipal liability suits. The Court said, "[F]or liability to attach in this circumstance the identified deficiency must be closely related to the ultimate injury. Thus in the case at hand, respondent must still prove that the deficiency in training actually caused the police officers' indifference to her medical needs. . . . To adopt lesser standards of fault and causation would open municipalities to unprecedented liability under § 1983." *City of Canton*, 489 U.S. at 391.

In upholding the district court judgment, the Fifth Circuit applied a far more lenient causation standard than that mandated by *Tuttle* and *City of Canton*. The appeals court merely stated in general terms, "inadequate screening of a deputy could likely result in the violation of citizens' constitutional rights." Pet. App. 23a. The court added

without explanation, "[T]he jury could find that hiring an unqualified applicant and authorizing him to make forcible arrests actually caused the injuries suffered by Mrs. Brown." *Id.* at 24a. Had the proper causation standard been applied by the lower courts, Mrs. Brown never would have been permitted to present her claims to a jury.

Mrs. Brown made much, for example, of the fact that Burns had several misdemeanor convictions on his record -- including one for assault and battery. She offered no evidence, however, that this minor criminal record *caused* the constitutional violation -- *e.g.*, that a similarly situated officer without a minor criminal record would not have dragged her from her vehicle;[6] or that Burns suffered from some psychological defect (as evidenced by his misdemeanor record) that caused him to use excessive force in dealing with Mrs. Brown. Nor did Mrs. Brown offer evidence attempting to rule out other likely causes of Burns' violent behavior -- such as that he was having the same kind of "bad day" that even those without misdemeanor records can have on occasion, or that he made a mistake in judgment. *See, e.g., City of Canton*, 489 U.S. at 391 ("And plainly, adequately trained officers occasionally make mistakes; the fact that they do says little

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[6] *Amici* note that there is no indication that Deputy Morrison, Burns' partner, had a similar record of misdemeanor convictions. Mrs. Burns nonetheless contended in her suit that Morrison also acted highly inappropriately on the night in question (*e.g.*, by approaching her vehicle with his gun drawn), thereby violating her constitutional rights. Thus, the facts in this case lend little support to Mrs. Brown's contention that Bryan County's decision to hire someone with a misdemeanor criminal record was the "moving force" behind the violation of her constitutional rights.

about the training program or the legal basis for holding the city liable.").

Moreover, Mrs. Brown's claims are premised on the assumption that a municipality could develop a fool-proof hiring policy that would ensure that all those hired would never resort to unwarranted use of force. That assumption is unrealistic, as the Court recognized in *City of Canton* in connection with an inadequate training claim. The Court stated that a training program should not be adjudged deficient simply because a single police officer passed through without acquiring necessary skills. The Court said, "That a particular officer may be unsatisfactorily trained will not alone suffice to fasten liability on the city, for the officer's shortcomings may have resulted from factors other than a faulty training program." *City of Canton*, 489 U.S. at 390-91. Similarly, there is no basis for criticizing Bryan County's hiring policy simply because one allegedly unfit applicant slipped through the screening process. It is easy for Mrs. Brown to second-guess Sheriff Moore after-the-fact and contend that data known to him (including Burns's misdemeanor record) should have caused him to disqualify Burns. But in the absence of evidence that Bryan County's hiring policy has led to similar incidents of police misconduct, *City of Canton* counsels against a finding that Mrs. Burns has established the necessary "affirmative link" between the hiring policy and her injuries.

Tuttle absolutely insists that a plaintiff attempting to demonstrate an "affirmative link" between a challenged policy (which is not itself unconstitutional) and the alleged constitutional deprivation, must introduce "considerably more proof than the single incident." *Tuttle*, 471 U.S. at 824 (plurality opinion). Mrs. Brown has failed to meet that burden. Other than the evidence relating to her encounter

with Burns, Mrs. Brown's case rests solely on Bryan County's acceptance of the job application of someone with a misdemeanor assault and battery record, an acceptance that was fully in accord with Oklahoma law.[7] In the absence of evidence that those with a history of such convictions have, in the aggregate, appreciably inferior job performance records than those who do not, the misdemeanor evidence adds little to Mrs. Brown's case.

A. Allegedly Deficient Hiring Policies Can Never Serve as a Predicate for Municipal Liability Under § 1983.

Indeed, *amici* respectfully suggest that, given the extreme difficulty in *ever* demonstrating that a deficient hiring policy was the "moving force" behind subsequent misconduct by law enforcement officers, the Court should find as a matter of law that hiring policies can *never* serve as the basis for § 1983 liability. Hiring policies are distinguishable from training policies in this regard,

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[7] Mrs. Brown also contends, of course, that Bryan County's training of Burns amounted to deliberate indifference toward her constitutional rights. That issue is not now before the Court. If the Court reverses the Fifth Circuit's decision, Mrs. Brown presumably will have the right to raise the training issue on remand.

The inherent inconsistency between Mrs. Brown's two causes of actions merits a brief mention, however. If Bryan County's deficient training program was the "moving force" behind the violation of Mrs. Brown's constitutional rights, then the county's deficient hiring program could not have also been the "moving force" behind that violation. The high standard of causation demanded in municipal liability cases precludes both programs from being "affirmatively linked" to Burns' conduct. The district court's entry of judgment for Mrs. Brown on both causes of action was, therefore, of dubious propriety.

because the consequences of inadequate training are significantly more predictable. As the Court recognized in *City of Canton*:

> [C]ity policymakers know to a moral certainty that their police officers will be required to arrest fleeing felons. The city has armed its officers with firearms, in part to allow them to accomplish this task. Thus, the need to train officers in the constitutional limitations on the use of deadly force, see *Tennessee v. Garner*, 471 U.S. 1 (1985), can be said to be "so obvious," that failure to do so could be characterized as "deliberate indifference" to constitutional rights.

City of Canton, 489 U.S. at 390 n.10. The need for training is said to be "obvious" because the failure to train "will create an extremely high risk that constitutional violations will ensue." *Id.* at 396 (O'Connor, J., concurring in part and dissenting in part).

In contrast, it is virtually never "obvious" which job applicants have what it takes to become adequate law enforcement personnel and which do not. Mrs. Brown and her expert witness believe that those with misdemeanor assault and battery records should automatically be disqualified from consideration, while Bryan County and the Oklahoma state legislature disagree. Given the absence of an obviously correct answer to that question, principles of federalism counsel against the federal judiciary imposing its views on the matter upon municipal personnel officials.

Moreover, there are simply too many intervening variables to state with any degree of confidence that a deficient hiring policy was the "moving force" behind a subsequent constitutional violation. One prominent intervening variable is job training; one can expect that any successful job applicant will be required to undergo training before being assigned to law enforcement responsibilities, and that an adequate training program will weed out those who demonstrate an obvious unfitness for police work. Unless one totally discounts the possibility that people are capable of overcoming troubled pasts to become productive members of society, one cannot predict with confidence that those with minor criminal records cannot be molded (with proper training) into competent police officers. If they later engage in unconstitutional conduct during their police work, there is simply no meaningful way to determine that the misconduct was "affirmatively linked" to a deficient municipal hiring policy as opposed to deficient training, an honest mistake, or any one of numerous other potential causes.

In sum, Mrs. Brown has failed to demonstrate an "affirmative link" between Bryan County's allegedly deficient hiring policy and her injuries. Indeed, precisely because it is virtually impossible to establish an affirmative link between a deficient hiring policy and a subsequent constitutional violation, *amici* respectfully suggest that the Court declare that allegedly deficient hiring policies cannot serve as a predicate for municipal liability under § 1983.

III. PRINCIPLES OF FEDERALISM DICTATE THAT FEDERAL COURTS NOT INTERFERE WITH MUNICIPAL LAW ENFORCEMENT PRACTICES

A principle motivation behind *amici*'s participation in this case is their concern that the rapid expansion of § 1983 municipal liability causes of action in the federal courts is upsetting principles of federalism by moving decision-making from the state and local level to the federal level.

Amici believe that the Court can go a long way toward halting that expansion by making clear that § 1983 municipal liability may be invoked only under relatively narrow circumstances.

In the 18 years since *Monell* was decided, the exposure of municipal governments to tort suits has increased drastically. For example, between 1978 and 1986, the amount paid out by New York City annually to resolve tort/personal injury claims increased six-fold, to $138.9 million. *City's Nemesis: Lawyer Lipsig Makes a Killing Suing People of New York*, WALL ST. J., March 16, 1988. The city's annual tort-claims payments are now well in excess of $200 million, and the city's comptroller has warned of a "municipal liability crisis." *Id.*

Moreover, the effect of § 1983 lawsuits is not merely financial. If the Court affirms the judgment in this case, one can readily expect that municipalities around the country will alter their employment practices accordingly. Police departments will become increasingly wary of hiring anyone who has ever been convicted of a misdemeanor, in order to reduce the possibility of crippling tort suits. As the Court has readily acknowledged in other contexts, the threat of tort awards can be a highly effective means of government regulation. *See Cipollone v. Liggett Group, Inc.*, 112 S. Ct. 2608, 2620 (1992) ("State regulation can be as effectively exerted through an award of damages as through some form of preventive relief. The obligation to pay compensation can be, indeed is designed to be, a potent method of governing conduct and controlling policy.").

Yet, as the Court recognized in *Rizzo v. Goode*, 423 U.S. 362, 378 (1976), "important considerations of

federalism" weigh against any federal-court challenge (including challenges in the form of § 1983 actions) to the exercise of authority by state law enforcement authorities. While *Rizzo* involved an effort to enlist the federal court's injunctive powers to control internal procedures within a municipal police department, the instant suit for damages is likely to have at least as much effect on such procedures as could any federal-court injunction.

The lower federal courts have already gone a long toward federalizing municipal law enforcement personnel practices through their increasing recognition of § 1983 municipal liability causes of action. *Amici* request that the Court begin to reverse that process. As the Court recognized in *City of Canton*, a too-broad interpretation of § 1983 municipal liability:

> [E]ngages the federal courts in an endless exercise of second-guessing municipal employee-training programs. This is an exercise we believe the federal courts are ill-suited to undertake, as well as one that would implicate serious questions of federalism.

City of Canton, 489 U.S. at 392. Those words are equally valid in the context of municipal hiring programs.

CONCLUSION

Amici curiae Washington Legal Foundation and the Allied Educational Foundation respectfully request that the Court reverse the decision of the U.S. Court of Appeals for the Fifth Circuit.

Respectfully submitted,

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June 21, 1996

Counsel wish to acknowledge the assistance of Priya Bharathi, a third-year student at Texas Tech University Law School, in preparing this brief.

No. 95-1100

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1996

THE BOARD OF THE COUNTY COMMISSIONERS OF BRYAN COUNTY, OKLAHOMA,

Petitioner,

- against -

JILL BROWN, et al.,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR AMICUS CURIAE, THE CITY OF NEW YORK

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STATEMENT OF FACTS

INTEREST OF AMICUS CURIAE

The City of New York ("the City") submits this brief as amicus curiae in support of the position advanced by

petitioner, the Board of the County Commissioners of Bryan County, Oklahoma ("the County"). The City argues that this Court should reverse the judgment of the United States Court of Appeals for the Fifth Circuit, entered October 23, 1995, insofar as that judgment affirmed the imposition of liability upon the County under 42 U.S.C. § 1983. The Court of Appeals held that the County was liable under that statute for a sheriff's solitary action in hiring a reserve deputy sheriff.

The City has a practical interest in the issue of law presented here. The City is a frequent defendant in actions brought pursuant to 42 U.S.C. § 1983. Between 1993 and 1995, inclusive, plaintiffs commenced approximately 550 actions against the City in federal

courts under that statute for alleged constitutional violations by police officers and correction officers. Other such actions were commenced against the City in state court during that time. In those three calendar years, settlements and judgments in federal § 1983 actions involving police officers and correction officers resulted in payouts amounting to approximately $18 million. The parameters of municipal liability under § 1983 have a concrete impact on the public fisc of the City.

The City frequently is a defendant in cases similar to this. A usual claim in police and correction cases against the City is that the City was negligent in hiring, training, or supervising the officer whose behavior is at issue. In New York City, where employing a multi-

cultural police force is an important policy goal, individual hiring decisions should not be considered proof of deliberate indifference amounting to a policy or practice. One isolated decision of a final policymaker is not necessarily a final agency policy or practice. The instant case presents an opportunity for this Court to clarify difficult questions regarding municipal liability for practices or policies which are not in themselves unconstitutional.

ARGUMENT

THE COURT OF APPEALS ERRED IN HOLDING THAT THE COUNTY WAS LIABLE UNDER 42 U.S.C. § 1983 FOR THE SHERIFF'S SINGLE DECISION TO HIRE A RESERVE DEPUTY SHERIFF. THE PLAINTIFFS FAILED TO MAKE A SUFFICIENT SHOWING THAT THE COUNTY HAD BEEN DELIBERATELY INDIFFERENT TO A VIOLATION OF THEIR CONSTITUTIONAL RIGHTS.

The City is confident that the parties to this appeal will brief the issues competently and comprehensively.

The City wishes only to submit its comments on the issue of municipal liability for decisions involving the hiring and training of employees, especially police and correction officers. Without some minimum standards for proof of municipal indifference to constitutional violations, almost all allegations of such indifference will suffice to send a case to the jury. Those minimum standards are already set forth in prior precedents of this Court.

In Monell v. Department of Social Services of the City of New York, 436 U.S. 658 (1978), this Court held that municipalities are liable under 42 U.S.C. § 1983 for constitutional violations only where "execution of a government's policy or custom, whether made by its lawmakers or by those whose edicts or acts may

fairly be said to represent official policy, inflicts the injury...." Id. at 694. Municipal liability can be based only on a municipal policy or custom.

This case presents no issue of who is the relevant policymaker. The parties have agreed that "Sheriff Moore was the final policymaker for the Sheriff's Department." Brown v. Bryan County, OK, 67 F.3d 1174, 1182 (5th Cir. 1995).

When a municipal policy or custom is itself unconstitutional, the proof of a case under § 1983 is conceptually direct. Where the policy itself is not unconstitutional, as in this case, proof is necessarily more complicated. All constitutional injuries can be traced back to some municipal policy at some level of abstraction. For instance, the plaintiffs in the instant case would not

have suffered their injury absent the County's policy of maintaining a police force. See City of Oklahoma City v. Tuttle, 471 U.S. 808, 823 (1985)(plurality opinion).

This Court has considered municipal liability arising from a constitutional policy in the context of the training and supervision of police officers. See, e.g., City of Canton, Ohio v. Harris, 489 U.S. 378 (1989). The same principles have been applied in the context of the hiring of police officers. Baker v. Putnal, 75 F.3d 190 (5th Cir. 1996). In Walker v. City of New York, 974 F.2d 293 (2d Cir. 1992), cert. denied, 507 U.S. 961 (1993), the United States Court of Appeals for the Second Circuit accurately observed that the requirement of tracing

constitutional torts to a municipal policy (Id. at 297)

> ... necessarily molds many § 1983 claims against municipalities into "failure to train" or "failure to supervise" claims. It is only by casting claims in this way that plaintiffs can link an actual decision by a high level municipal official to the challenged incident.

An alleged failure to train or supervise an officer can result in municipal liability under § 1983 only if it proceeds from a municipal policy or custom.

In City of Canton, Ohio v. Harris, this Court held that "there are limited circumstances in which an allegation of 'failure to train' can be the basis for liability under § 1983." Id. at 387. This Court further held that "the inadequacy of police training may serve as the basis for § 1983 liability only

where the failure to train amounts to deliberate indifference to the rights of persons with whom the police come in contact." Id. at 388. The instant case presents the issue of how a plaintiff can prove such deliberate indifference.

In Vann v. City of New York, 72 F.3d 1040, 1049 (2d Cir. 1995), the United States Court of Appeals for the Second Circuit addressed the proof of deliberate indifference in the context of claims of inadequate supervision of police:

> To prove such deliberate indifference, the plaintiff must show that the need for more or better supervision to protect against constitutional violations was obvious. [citation omitted] An obvious need may be demonstrated through proof of repeated complaints of civil rights violations; deliberate indifference may be inferred if the complaints are followed by no meaningful attempt on the part of the municipality to investigate or to forestall

> further incidents. [citations omitted] Deliberate indifference may also be shown through expert testimony that a practice condoned by the defendant municipality was "contrary to the practice of most police departments" and was "particularly dangerous" because it presented an unusually high risk that constitutional rights would be violated. [citations omitted]

The Court of Appeals thus accurately noted two different ways of proving a municipality's deliberate indifference to the violation of constitutional rights. One method involves proof of past civil rights complaints. The other method involves proof of an obviously dangerous practice.

The first method of proof is apparently not involved in the instant case. There apparently was no proof of any prior civil rights violations by the County. The Court of Appeals, at any

rate, did not base its decision on such a ground in this case.

The second method of proof was invoked by the Court of Appeals in this case (67 F.3d at 1184-1185):

> We also find the evidence sufficient for a jury to conclude that Sheriff Moore's decision to hire Burns amounted to deliberate indifference to the public's welfare. [citations omitted] In light of the law enforcement duties assigned to deputies, the obvious need for a thorough and good faith investigation of Burns, and the equally obvious fact that inadequate screening of a deputy could likely result in the violation of citizens' constitutional rights, Sheriff Moore can reasonably be said to have acted with deliberate indifference to the public's welfare when he hired Burns. [citation omitted] The failure to conduct a good faith investigation of the prospective employee amounted to Sheriff Moore deliberately closing his eyes to the Burns' background. Such indifferent behavior cannot be tolerated when the prospective applicant

> will be employed in a position of trust and authority.

Although the quoted passage vividly expresses the indignation of the Court of Appeals, it is in error in stating that there was sufficient proof to support a jury finding of deliberate indifference on the part of the County.

The holding of the Court of Appeals is infirm on the factual record. It appears that Deputy Burns had several traffic violations and one misdemeanor conviction arising from a fight with fraternity brothers when he was a teenaged college student. This is not a criminal record which can prove to a rational trier of fact that the Sheriff was deliberately indifferent to a substantial risk that the newly-hired deputy would commit civil rights violations. Even had the Sheriff

obtained the details of Burns' past encounters with the law, nothing there would have indicated that Burns was a poor candidate for deputy sheriff. In essence, there is no causation proven on these facts.

The Court of Appeals erred for a second reason. By enacting a general statute, the legislature of the State of Oklahoma has imposed standards for the hiring of deputy sheriffs. Candidates with felony convictions or convictions for crimes of moral turpitude are disqualified. Candidates must also undergo psychological testing and a police training course. The municipality has discretion to hire candidates with misdemeanor convictions. In this case, the Sheriff complied with state law in hiring the deputy.

The state statute provided guidelines for the hiring of Deputy Burns. The Sheriff followed those guidelines. The Sheriff obtained Burns' criminal record, sent him for psychological testing, and then hired and trained him pursuant to state law. By following state law, the Sheriff acted in a fashion which cannot be considered deliberate indifference for purposes of municipal liability. One cannot charge a municipality with deliberate indifference in being guided by standards adopted by the state legislature. In the small area of discretion exercised by the Sheriff, Deputy Burns' past criminal record was not one which required a refusal to hire. The Court of Appeals erred in holding that the evidence supported the jury verdict to the contrary.

Unless standards of proof are imposed upon the concept of deliberate indifference, claims such as the one presented here will almost always be allowed to go to the jury, where sympathy for an injured plaintiff will often result in municipal liability where there was no deliberate indifference to civil rights violations. Those standards of proof require proof of past violations or the ignoring of an inevitably dangerous situation. Disagreements over discretionary decisions should not amount to proof of deliberate indifference. This Court should clarify the concept of deliberate indifference and how it can be proven. This Court should hold that in order to prove deliberate indifferences that amounts to a policy or practice, a plaintiff must prove more than one

instance of constitutional infraction, combined with no meaningful response by the municipality. If one incident can, by itself, prove deliberate indifference which amounts to a policy or practice, liability on the basis of respondeat superior has been injected into the law of § 1983. This Court should not allow municipal liability to spread beyond the sensible limits set forth in Monell.

CONCLUSION

FOR THE REASONS STATED, THE JUDGMENT OF THE COURT OF APPEALS SHOULD BE REVERSED, AND JUDGMENT SHOULD BE ENTERED ON BEHALF OF THE COUNTY.

Respectfully submitted,

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No. 95-1100

IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

THE BOARD OF THE COUNTY COMMISSIONERS OF BRYAN COUNTY, OKLAHOMA,

Petitioner,

v.

JILL BROWN,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF OF
NOW LEGAL DEFENSE AND EDUCATION FUND,
CALIFORNIA WOMEN LAWYERS,
CONNECTICUT WOMEN'S EDUCATION AND LEGAL FUND, INC.,
EQUAL RIGHTS ADVOCATES,
NATIONAL COALITION OF 100 BLACK WOMEN, INC.,
NATIONAL ORGANIZATION FOR WOMEN FOUNDATION,
NORTHWEST WOMEN'S LAW CENTER,
WOMEN EMPLOYED,
WOMEN'S EQUAL RIGHTS LEGAL DEFENSE AND EDUCATION FUND,
WOMEN'S LAW PROJECT, AND
WOMEN'S LEGAL DEFENSE FUND
AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT

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July 24, 1996

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QUESTIONS PRESENTED

1. Does § 1983 impose municipal liability on a county for a single policy decision by a final policymaker that is deliberately indifferent to the public's welfare and that causes the violation of constitutional rights?

2. Does § 1983 impose municipal liability on a county for a hiring policy that is deliberately indifferent to the public's welfare and that causes the violation of constitutional rights?

3. Is it consistent with principles of federalism to impose § 1983 municipal liability on a county for a hiring policy that is deliberately indifferent to constitutional rights?

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INTERESTS OF *AMICI*

Amici, the organizations described below, champion women's constitutional rights and join in this brief because they recognize that those rights are particularly susceptible to infringement by acts of municipalities. *Amici* accordingly have strong interests in the decision of this Court, interests which will unquestionably suffer if there were to be a reversal of the judgment below. Vindication of women's rights requires municipal liability for the kind of constitutional violation committed here by a municipality's final policymaker.[1]

1. Descriptions of the individual *amici* organizations are set forth in the attached appendix. The written consents of the parties to the submission of this brief have been lodged with the Clerk pursuant to Rule 37.2.

STATEMENT OF THE CASE

In the early morning hours of May 12, 1991, Oklahoma's Bryan County Sheriff's department set up a police checkpoint near the Oklahoma-Texas border. J.A. 30a.[2] Deputy Sheriff Stacy Burns (''Burns'') was serving at the checkpoint when a pickup truck driven by Todd Brown (''Mr. Brown'') and Jill Brown (''Mrs. Brown'') approached. J.A. 31a. Burns had been recently hired by Sheriff B.J. Moore (''Sheriff Moore''), the final policymaker for the department and Burns' great uncle. J.A. 30a, 110a. Before hiring Burns, Sheriff Moore found in a background check that Burns, age 21, had several misdemeanor arrests and convictions. J.A. 114a-15a. His ''rap sheet'' included assault and battery, resisting arrest, drunk driving, driving with a suspended license, possession of false identification, and nine moving traffic violations. J.A. 41a. Sheriff Moore did not inquire into any of these charges. J.A. 115a. Nor did Sheriff Moore notice that there was an outstanding warrant for Burns' arrest at the time he hired Burns. J.A. 116a.

Mr. and Mrs. Brown were heading home to Bryan County, Oklahoma, from Grayson County, Texas, when they approached the police checkpoint. *Brown* v. *Bryan County*, 67 F.3d 1174, 1177 (5th Cir. 1995), *cert. granted*, 116 S. Ct. 1540 (1996). Not wanting to be delayed at the checkpoint, Mr. Brown decided to make a U-turn and return to Texas. *Id.* Burns, along with Deputy Sheriff Morrison (''Morrison''), pursued the Browns into Texas and pulled them over. *Id.* The jury found that the police pursuit was without probable cause. J.A. 134a.

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2. All references to ''J.A.'' are to the Joint Appendix submitted to this Court by the parties.

When the Browns' truck stopped, Morrison exited his squad car and pointed his drawn gun at the Browns' vehicle, ordering them to raise their hands. *Brown*, 67 F.3d at 1178. Burns, acting without direction from Morrison, approached the passenger side of the truck where Mrs. Brown was sitting. J.A. 96a. After commanding Mrs. Brown to leave the truck, Burns forcibly pulled Mrs. Brown from her seat and threw her to the pavement. *Brown*, 67 F.3d at 1178. Burns then pinned Mrs. Brown to the ground on her knees, and handcuffed her hands behind her. *Id.* Mrs. Brown remained that way from thirty minutes to an hour without being charged with any crime. *Id.*

Burns' actions severely injured Mrs. Brown. *Id.* As a direct result of Burns' conduct, Mrs. Brown has undergone four knee operations. *Id.* She requires total knee replacements. *Id.*

Mrs. Brown brought claims against Bryan County, Burns, Morrison, and Sheriff Moore under 42 U.S.C. § 1983 (1996). J.A. 20a. She alleged that Burns used excessive force on her, unlawfully arrested her, and falsely imprisoned her in violation of her constitutional rights. *Id.*

Mrs. Brown's claims were tried before a jury in the United States District Court for the Eastern District of Texas. The jury found in Mrs. Brown's favor on all counts, and the district court entered judgment on the verdict against both Burns and Bryan County. J.A. 134a-35a.[3] The jury found that the hiring policy of Bryan County in Burns' case was ''so

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3. The district court dismissed claims against Morrison and Sheriff Moore, J.A. 19a, and granted judgment notwithstanding the jury's verdict with respect to plaintiff's claim for loss of past income or future earning capacity. *Brown*, 67 F.3d at 1177.

inadequate as to amount to deliberate indifference to the constitutional needs'' of Mrs. Brown. J.A. 135a. Respondent's expert testified that Burns' arrest record showed a ''blatant disregard for the law'' and raised questions about his fitness to be a police officer. *Brown*, 67 F.3d at 1184. The expert stated that at a ''minimum,'' Sheriff Moore should have inquired further into the charges against Burns. *Id.* Petitioner's own expert agreed that Burns' criminal history should have triggered further review and, when asked if he would have hired Burns, replied ''doubtful.'' J.A. 84a.

The United States Court of Appeals for the Fifth Circuit affirmed the district court's decision, 67 F.3d 1174, holding that the jury could have ''reasonably inferred that Sheriff Moore 'closed his eyes' to Burns' background when hiring him.'' *Brown*, 67 F.3d at 1183. This Court granted Bryan County's petition for certiorari on April 22, 1996. 116 S. Ct. 1540 (1996).

SUMMARY OF ARGUMENT

Congress enacted § 1983 to protect individuals' civil rights from abuse by ''persons'' acting under color of state law and to provide remedies for constitutional violations. Section 1983 and the evolution of this Court's precedent mandate that a municipality, as a person within the meaning of § 1983, be liable for a single act by a final policymaker when a fact-finder finds both deliberate indifference to constitutional rights and that the policy has proximately caused constitutional injury. *See infra* Parts I(A) and I(B).

The standard established by this Court's prior decisions for municipal liability has clearly been met in the instant case. Bryan County's single act was to hire Burns without giving any consideration to his criminal record. Sheriff Moore, who made the hire, was the final policymaker for the municipality and, thus, acted as the municipality. As the jury found, Sheriff Moore was deliberately indifferent to the public's

constitutional rights when he deliberately failed to investigate Burns' criminal background before he hired him. Mrs. Brown's constitutional injury was a direct result of Sheriff Moore's indifference. The Fifth Circuit's decision on appeal properly affirmed the judgment of the district court and the underlying jury findings on the issues of deliberate indifference and causation. *See infra* Part I(C).

Affirming the decision below is fully consistent with the federal principles embodied in the Constitution, for which § 1983 has provided remedies in federal courts for 125 years. The decision below does not eviscerate any legitimate independent state or municipal interests. Rather, it fosters the *constitutional* interests that *both* the state and federal governments are committed to uphold. *See infra* Part I(D).

Finally, the practical importance of this application of § 1983 to the minority interests that § 1983 was enacted to protect, is amply illustrated by reference to instances where women's civil and constitutional rights have been violated by the single act of a municipal policymaker. *See infra* Part II.

ARGUMENT

I. MUNICIPAL LIABILITY UNDER § 1983 FOR A SINGLE ACT OF A MUNICIPAL POLICYMAKER THAT CAUSES THE VIOLATION OF CONSTITUTIONAL RIGHTS IS MANDATED BY THIS COURT'S PRECEDENTS AND THE PURPOSES UNDERLYING § 1983.

A. Section 1983 was enacted to protect citizens from constitutional abuses by municipalities.

Section 1 of the Civil Rights Act of 1871, now codified as 42 U.S.C. § 1983, was enacted to protect citizens from consti-

tutional abuses by state authorities.[4] *See Monroe* v. *Pape*, 365 U.S. 167 (1961), *overruled in part or other grounds by Monell* v. *Dept. of Social Services*, 436 U.S. 658 (1978). At the time of its enactment, Congress sought to protect citizens from state acquiescence in civil rights transgressions such as Ku Klux Klan activity. *Id.* at 174; *Monell* v. *Dept. of Social Services*, 436 U.S. 658, 665 (1978). Section 1983 was designed to override the enforcement by those acting under color of state law, or discriminatory local laws and regulations, to provide a remedy where state remedies were inadequate or non-existent, and to afford a remedy in federal court where state laws were adequate in theory "but not available in practice." *Monroe*, 365 U.S. at 173-74. By imposing civil liability on state actors, § 1983 deters unconstitutional uses of state power and compensates victims. *Owen* v. *City of Independence*, 445 U.S. 622, 651 (1980).

In *Monell*, this Court held that liability for constitutional violations pursuant to § 1983 extended to municipal governments and their policymakers. 436 U.S. at 690. "So long as federal courts were vindicating the Federal Constitution," this Court explained in its review of the legislative history, "they were providing the 'positive' government action required to protect constitutional rights . . . ." *Id.* at 680-81. In enacting § 1983, Congress "intended to give a broad

4. Section 1983 provides in relevant part: "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress." 42 U.S.C. § 1983.

remedy for violations of federally protected civil rights," including violations by municipalities.[5] *Id.* at 685. That principle of § 1983 jurisprudence is beyond peradventure.

B. This Court's precedents provide that under § 1983 a municipality is liable for a single act by a final policymaker that shows deliberate indifference to constitutional rights and causes constitutional injury.

In *Monell*, the Court held that municipalities were liable "when execution of a government's *policy or custom*, whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy, inflicts the [constitutional] injury . . . ." *Monell*, 436 U.S. at 694 (emphasis added).[6] The mandatory pregnancy leave at issue in *Monell* "unquestionably involve[d] official policy as the moving force of the constitutional violation . . . ." *Id.* Thus, the Court held that liability attached because the policy was deliberate, and in so deciding drew a line which still stands today: municipal liability requires deliberate "policy" and a municipality will not be found vicariously liable through the application of the doctrine of *respondeat superior*.

5. *See also Owen*, 445 U.S. at 647-48 ("[T]he municipality's 'governmental' immunity is obviously abrogated by the sovereign's enactment of a statute making it amenable to suit. Section 1983 was just such a statute. By including municipalities within the class of 'persons' subject to liability for violations of the Federal Constitution and laws, Congress — the supreme sovereign on matters of federal law — abolished whatever vestige of the State's sovereign immunity the municipality possessed.") (footnote omitted).

6. In *Monell*, the Court found a municipality liable for its official policy of forcing pregnant employees to take unpaid leaves of absence, a policy that violated the constitutional right to equal protection. *Id.*

In the aftermath of *Monell*, the Court has refined the contours of municipal liability in several decisions. In *Oklahoma City* v. *Tuttle*, 471 U.S. 808, 821-24 (1985), the Court considered the question whether a single isolated incident of the use of excessive force by a police officer established an "official policy" or practice of the municipality sufficient to render it liable under the test established in *Monell*. In this context, where the policy relied upon was not itself unconstitutional, the Court held that liability could still attach but that "considerably more proof than the single incident will be necessary in every case to establish both the requisite fault on the part of the municipality, and the causal connection between the 'policy' and the constitutional deprivation." *Id.* at 824 (plurality opinion) (footnotes omitted).

Tuttle involved the constitutionality of police training when a low-level, non-policymaking police officer shot and killed an unarmed robbery suspect. Although there was expert testimony that the training was inadequate, the jury was instructed that the "municipality could be held liable for a 'policy' of 'inadequate training' *based merely* upon evidence of a single incident of unconstitutional activity." *Id.* at 813 (emphasis added). The *Tuttle* plurality rejected these jury instructions as erroneous, holding that "the instructions allowed the jury *to infer* a thoroughly nebulous 'policy' of 'inadequate training' on the part of the municipal corporation from a single incident . . . ." *Id.* 823 (emphasis added). This Court rejected allowing a § 1983 plaintiff to establish municipal liability without submitting proof of a single action taken by a municipal policymaker. *Id.* at 821.

In *Pembaur* v. *City of Cincinnati*, 475 U.S. 469 (1986), the Court again considered whether a municipality is liable for a single unconstitutional act by a final policymaker and attempted to resolve questions left unanswered by the *Tuttle* plurality. *Pembaur* involved a municipal policymaker ordering police to enter a physician's clinic to serve *capiases* on third parties. 475 U.S. at 472. The unwarranted search violated the physician's Fourth and Fourteenth Amendment

rights to due process of law. *Id.* at 484. A plurality of this Court held the municipality liable for the final policymaker's "deliberate choice" of ordering this unconstitutional action. *Id.* at 483. The Court explained that "[m]unicipal liability attaches only where the decisionmaker possesses final authority to establish municipal policy with respect to the action ordered." *Id.* at 481. Unlike *Tuttle*, the single incident in *Pembaur*, was directly attributable to a final policymaker and, thus, represented municipal policy. "In ordering the Deputy Sheriffs to enter petitioner's clinic," the Court explained, "the County Prosecutor was acting as the final decisionmaker for the county, and the county may therefore be held liable under § 1983." *Id.* at 485. A majority of the Court specifically held that a single act could be sufficient for municipal liability. *Id.* at 481.

Three years later, in *City of Canton* v. *Harris*, 489 U.S. 378 (1989), this Court considered whether a municipality can be liable under § 1983 for a "policy" of inadequate police training. In *City of Canton*, a police officer acted indifferently to the medical needs of a person brought into police custody, thereby violating her Fourteenth Amendment right to due process. 489 U.S. at 381. The Court found that "[o]nly where a failure to train reflects a 'deliberate' or 'conscious' choice by the municipality can the failure be properly thought of as an actionable city 'policy.'" *Id.* at 389. The failure to train must amount to "deliberate indifference to the rights" of the public. *Id.* at 388. In remanding the case to determine whether the need for further police training was "plainly obvious," this Court explained:

> "it may happen in light of the duties assigned to specific officers or employees the need for more or different training is so obvious, and the inadequacy so likely to result in the violation of constitutional rights, that the policymakers of the city can reasonably be said to have been deliberately indifferent to the need."

Id. at 390. The Court further held that the injured party "must still prove that the deficiency in training actually caused the police officers' indifference to her medical needs." *Id.* at 391.

Amici submit that through these decisions a consistency as to the scope of § 1983 liability has emerged that bears directly on the case at bar. Broadly, § 1983 and this Court's precedent establish that a municipality is liable if its policy *or* a single act by its final policymaker is made with deliberate indifference to the public welfare and causes a violation of constitutional rights. Since Congress intended the "persons" who are subject to § 1983 liability to include "municipalities," *Monell*, 436 U.S. at 690, § 1983 applies to "single acts by a final policymaker" because, in appropriate circumstances, they constitute final municipal "policy." *Pembaur*, 475 U.S. at 485. Such circumstances were clearly proven at trial in this case.

C. The Fifth Circuit correctly affirmed the district court judgment holding Bryan County liable under § 1983 for hiring a police officer with deliberate indifference to the applicant's criminal record and for causing a constitutional violation.

The conditions for imposing § 1983 liability are met by the facts in this case. Sheriff Moore's single hiring decision constituted municipal "policy." Although Bryan County now attempts to argue that Sheriff Moore was not a final policymaker, Pet'r. Br. at 19, Petitioners had conceded throughout the litigation that he was "*the* policy maker for Bryan County regarding the Sheriff's Department." J.A. 30a (Excerpted Stipulation) (emphasis added). Nor did Petitioner list Sheriff Moore's policymaking status as a disputed fact in the joint pretrial order. Joint Pre-Trial Order at 10-11, filed March 26, 1993. Nor did Petitioner take issue with Sheriff Moore's policymaking role in either the trial or the appeal. *Brown*, 67 F.3d at

1182. Finally, Petitioner did not object to the jury instructions which referred to Sheriff Moore as the final policymaker, thereby waiving the issue. *Brown*, 67 F.3d at 1182 n. 17; *see also City of Springfield* v. *Kibbe*, 480 U.S. 257, 259 (1987) (holding that the rule against deciding questions not raised in the lower courts has "special force where the party seeking to argue the issue has failed to object to a jury instruction"). Accordingly, the Court of Appeals properly found that "Bryan County stipulated that Sheriff Moore was the final policymaker for the Sheriff's Department." *Brown*, 67 F.3d at 1182.[7]

As final policymaker, a single decision by Sheriff Moore subjects Bryan County to liability under this Court's precedent. *Pembaur*, 475 U.S. at 481:

> "If the decision to adopt that particular course of action is properly made by that government's authorized decisionmakers, it surely represents an act of official government 'policy' as that term is understood. More importantly, where action is directed by those who establish governmental policy, the

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7. Indeed, Petitioner's own words implied that Sheriff Moore's decision represented municipal policy. *See, e.g.*, Petition for a Writ of Certiorari at 13, *Brown* v. *Bryan County*, 67 F.3d 1174 (5th Cir.), *cert. granted*, 116 S. Ct. 1540 (1996) (No. 95-1100) ("[w]hat used to be *constitutional* county policy — Oklahoma's vesting county's [sic] with discretion to hire peace officers"). Even in its brief, Petitioner neither confirms nor denies that the sheriff is the final policymaker. Petitioner has been much clearer in the past in admitting that Sheriff Moore was the final policymaker for Bryan County. *See* Petition for a Writ of Certiorari at 14, *Brown* (No. 95-1100) ("[U]nder Oklahoma law, the legislature has ceded to sheriffs the discretion to determine whether to employ individuals with prior misdemeanor convictions."). Even Sheriff Moore admitted that he is the "decision maker" for Bryan County's Sheriff's Department. *See* J.A. 114a.

> municipality is equally responsible whether that action is to be taken only once or to be taken repeatedly."

In the instant case, Oklahoma vested final policymaking authority with the individual sheriffs' departments in matters relating to the police department. *See* Pet'r. Br. at 14. Accordingly, Sheriff Moore made final employment policy for the Bryan County police department. During his four years as sheriff, he hired at least six deputies. J.A. 106a. Likewise, the decision to hire Burns fell within the scope of his delegated authority. Therefore, Sheriff Moore's decision represented the final policy of Bryan County under the rationale of *Pembaur*.[8]

1. The standards of fault and causation established in *City of Canton* under a "failure to train" theory should also apply to municipal hiring policies.

A municipality should be held to the same standard of liability whether it fails to train or recklessly hires its law enforcement personnel. Indeed, there is no meaningful distinction between the two. When a municipality hires a police

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8. *Tuttle*, 471 U.S. 808, is clearly distinguishable. In *Tuttle*, the jury improperly *inferred* the existence of an unconstitutional training policy based on a single unconstitutional act by a low-level police officer. In this case, the jury did not simply "infer" an inadequate hiring policy but found one based on the facts. J.A. 135a (interrogatory no. 7). As previously stated, Petitioner conceded that Sheriff Moore made final employment policy. Plaintiffs also produced evidence that Sheriff Moore paid no attention to Burns' criminal record, that experts believed that Burns' criminal record indicated a potential problem, and that Sheriff Moore was deliberately indifferent to the consequences of his hiring Burns. *See infra* Part (I)(B)(1)(a).

officer it implicitly asks the public to trust that officer's decisionmaking abilities and authority. Citizens, in turn, trust the municipality to use sound selection practices in hiring the individuals who will obtain extraordinary power over citizens' lives.

This Court holds municipalities liable in failure to train cases in situations in which the municipality's failure "amounts to deliberate indifference to the rights of persons with whom the police come into contact." *City of Canton*, 489 U.S. at 388. This same standard should apply when a plaintiff sues a municipality under an inadequate hiring claim. *See, e.g., Simpkins* v. *Bellevue Hospital*, 832 F. Supp. 69, 75 (S.D.N.Y. 1993) ("The Supreme Court's holding in *City of Canton* with respect to training of police is equally applicable to claims concerning training of medical personnel and hiring and supervision of medical personnel."). This standard ensures that municipalities will be found liable under § 1983 for hiring decisions only when the relevant policymakers should have foreseen the risks and dangers caused by the hiring decision. *Cf. Gonzalez* v. *Ysleta Indep. Sch. Dist.*, 996 F.2d 745, 762 (5th Cir. 1993) (reversing a jury verdict because the evidence established that the school district investigated sexual abuse allegations against an employee before deciding to retain him, thus precluding a finding of deliberate indifference).

a. Deliberate Indifference

The trial judge here properly instructed the jury that it must find deliberate indifference in order to hold the municipality liable. *See* J.A. 123a. The instructions read:

> "Sheriff B.J. Moore would have acted with deliberate indifference in adopting an otherwise constitutional hiring policy for a deputy sheriff if the need for closer

> scrutiny of Stacy Burns' background was so obvious and the inadequacy of the scrutiny given so likely to result in violations of constitutional rights, that Sheriff B.J. Moore can be reasonably said to have been deliberately indifferent to the constitutional needs of the Plaintiff."

Id. Thus, as long as a reasonable jury could find deliberate indifference, the verdict below must stand. The jury reasonably concluded that Sheriff Moore's hiring decision was deliberately indifferent to the constitutional rights of the municipality's inhabitants. The question of deliberate indifference properly rests with the jury. *See Wood* v. *Ostrander*, 879 F.2d 583, 588 n.4 (9th Cir. 1989), *cert. denied*, 498 U.S. 938 (1990) (noting that, because deliberate indifference is decided by a jury, "the district court will face the difficult task of defining for the jury the term[] . . . 'deliberate indifference'"); *see also Gregory* v. *City of Rogers*, 921 F.2d 750, 757 (8th Cir. 1990) (reversing order for summary judgment in part on the ground that deliberate indifference is an issue of fact to be decided by a jury).

The jury heard sufficient evidence to conclude that Sheriff Moore's hiring decision amounted to deliberate indifference. Sheriff Moore failed to notice several violations contained within the arrest record, including an arrest for assault and battery, false identification, and resisting arrest. *See, e.g.*, J.A. 115a. Moreover, Sheriff Moore admitted that he made no attempt to investigate the disposition or circumstances of any of the criminal charges against Burns, including the ones that he did observe on the arrest record. *See* J.A. 115a-116a.[9]

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9. Petitioner describes Burns' various offenses in significant detail, offering context to the crimes. Pet'r. Br. at 3-4. Sheriff Moore, however, saw only a cursory description of the offenses before him—"false identification," "resisting arrest," "assault and battery," not the elaborate narrative in Petitioner's brief. J.A. 114a-15a. These signals gave Sheriff Moore substantial notice that Burns had a propensity to commit a constitutional wrong, but Sheriff Moore made no effort to investigate the circumstances of the offenses or their dispositions.

The evidence also showed that an investigation would have revealed that Burns had repeatedly violated probation, and that a warrant had been issued for his arrest. *See* J.A. 41a. The jury also knew that most of Burns' arrests had occurred within two and one-half years of his use of excessive force on Mrs. Brown. J.A. 50a.

Expert testimony considered by the jury emphasized the importance of screening out applicants who would join the force with improper motives. *Brown*, 67 F.3d at 1184. Respondent's expert testified that Burns' arrest record should have made the sheriff suspicious of his qualifications and competency as an officer, and that it should have resulted, at a minimum, in a follow-up investigation. *Id.* Even Bryan County's expert told the jury that Burns' criminal history was a cause for concern that should have resulted in further review by the sheriff's department. J.A. 78a-79a. He also told the jury that at least one of Burns' offenses could be classified as a crime of moral turpitude, and therefore violative of Oklahoma state laws regarding police hires. *See id.* In fact, Petitioner's expert, when asked if he would have hired Burns, replied that it was "doubtful." *Id.* at 84a. Thus, as the Court of Appeals noted, the jury reasonably inferred that Sheriff Moore "closed his eyes" to Burns' background and failed to evaluate his fitness. *Brown*, 67 F.3d at 1184.

Petitioner asserts that Mrs. Brown failed to demonstrate that Bryan County knew to a "moral certainty" that Burns

would have committed a constitutional wrong. Pet'r. Br. at 22. However, this Court need not pause to consider whether Bryan County knew to a moral certainty that Burns would have violated constitutional rights, since such a test has no basis in this Court's § 1983 precedent. Knowledge to a moral certainty that a constitutional violation will occur may be sufficient to establish deliberate indifference, but it is not necessary. To the contrary, the Court has recently defined deliberate indifference as:

> "[An] official must both be aware of facts from which the inference could be drawn that a substantial risk of serious harm exists, and he must also draw the inference."

Farmer v. *Brennan*, 114 S. Ct. 1970, 1979 (1994). *See also Doe* v. *Hillsboro Indep. Sch. Dist.*, 81 F.3d 1395, 1403 (5th Cir. 1996) ("A hiring process demonstrates 'deliberate indifference,' when it constitutes such recklessness or gross negligence as to amount to conscious indifference to the plaintiff's constitutional rights.") (citation omitted); *Berry* v. *City of Muskogee*, 900 F.2d 1489, 1495-96 (10th Cir. 1990) (to prove deliberate indifference, there must be evidence demonstrating a higher degree of fault than negligence, but less than that required to demonstrate intentional and malicious intent).

The jury reasonably concluded that Sheriff Moore's behavior met the standard for deliberate indifference: he was aware of facts — Burns' numerous infractions of the law and his recent altercations with police — showing that Burns, if hired as a peace officer, could cause serious harm and yet he deliberately ignored the danger and hired Burns without further investigation. Consistent with the trial court's instruction, the jury properly concluded that "the need for closer scrutiny of Stacy Burns' background was so obvious and the inadequacy of the scrutiny given so likely to result in

violations of constitutional rights, that Sheriff B.J. Moore can be reasonably said to have been deliberately indifferent to the constitutional needs of the Plaintiff." *See* J.A. 123a.[10]

b. Causation

A rational jury could also properly find that Moore's decision to hire Burns caused the constitutional violation at issue. *City of Canton* established that there must be a direct causal link between a municipal policy or custom and the alleged constitutional deprivation to maintain a § 1983 action. 489 U.S. at 385-86. In the Court's words, the policy must be shown to have been the "moving force." *Monell*, 436 U.S. at 694.

Section 1983 causation requires a determination that the municipality had notice of a strong potential for unconstitutional behavior by the employee. *Cf. City of Canton*, 489 U.S. at 393 (O'Connor, J., concurring in part and dissenting in part) (Section 1983 causation requires more than "but for"

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10. The National Association of Counties ("NAC"), as *Amici* in support of Petitioner, attempts to describe Respondent's position as a blanket prohibition against hiring individuals with misdemeanor arrests. *See* Brief of NAC, *et al.*, as *Amici Curiae* in Support of Petitioner at 7, *Brown* (No. 95-1100). Respondent, however, takes no such position. The Constitution demands only that a municipality evaluate the offenses that an applicant has previously committed and undertake to avoid hiring those individuals who are likely to commit future constitutional violations. This is a standard upon which even the NAC *Amici* appear to concur. *See id.* (admitting that "most States treat such convictions as simply a factor to be evaluated," suggesting that to meet constitutional standards an evaluation of some sort must occur). Municipalities cannot turn a blind eye to highly likely future constitutional violations, because to do so places the citizenry at risk.

causation). If the policymaker acting in the name of the municipality could foresee or should reasonably have foreseen a danger, a duty to guard against constitutional violations by investigating the circumstances before proceeding with the hire, at the very least, arises. This responsibility becomes especially critical when municipalities appoint individuals in final decisionmaking roles imbued with police power and license to make forcible arrests.

The facts of this case support the jury's finding of causation.[11] Together, the jury charges and interrogatories made causation and its relationship to municipal liability sufficiently clear to the jury. *See, e.g., Carvalho* v. *Raybestos-Manhattan, Inc.*, 794 F.2d 454, 455 (9th Cir. 1986) (''Taken as a whole, the instructions and interrogatories must fairly present the issues to a jury. If the issues are fairly presented, the district court has broad discretion regarding the precise wording of the instructions and interrogatories.''); Fleming James, Jr. and Geoffrey C. Hazard, Jr., *Civil Procedure* § 7.14 at 359-60 (3rd ed. 1985). The trial judge explicitly instructed the jury that Bryan County could be found liable only if the inadequate hiring or training policy directly caused Mrs. Brown's injury. J.A. 122a. The jury specifically determined ''from a preponderance of the evidence'' that Respondent should be ''fairly and reasonably compensated . . . for . . . damages proximately caused by . . . the defendant . . . Bryan County acting through its policymaker Sheriff B.J. Moore.'' Petition for a Writ of Certiorari at 41a-42a, *Brown* (No.95-1100) (interrogatory no. 10).

Bryan County created a constitutional danger by adopting a hiring policy that was completely indifferent to prior illegal

11. Causation in a § 1983 action is a fact-intensive determination, which is committed to the finder of fact. *See City of Canton*, 489 U.S. at 391.

conduct. Sheriff Moore had notice of the danger from Burns' lengthy record. Sheriff Moore may not have known the details of Burns' various crimes, but he knew *of* them, yet he made no further investigation of the circumstances before deciding to hire Burns. His deliberate indifference to a potential danger was properly found by the jury to have caused the resulting offense.[12] Liability in this case thus rests on Sheriff Moore's total failure to investigate Burns' troubled background, not merely from the employment relationship alone. *See City of Canton*, 489 U.S. at 394 (O'Connor, J., concurring in part and dissenting in part).

D. Imposing municipal liability for single acts that are deliberately indifferent to the constitutional rights of the public is consistent with principles of federalism.

Bryan County asserts that the Fifth Circuit's holding violates basic federalism principles by sanctioning excessive federal interference with local concerns. *See* Pet'r. Br. at 15. There is, of course, a tension between federal interests and municipalities in the sphere of municipal law administration. *See Monroe*, 365 U.S. at 241-42 (Frankfurter, J., dissenting in part). Petitioner, however, oversimplifies the nature of our federal system. The Constitution is not just the blueprint for the federal government. It is a solemn contract — the

12. The causation finding draws support from the fact that it contains a cognitive element. *See Kibbe*, 480 U.S. at 269 (O'Connor, J., dissenting) (''Analogy to traditional tort principles . . . shows that the law has been willing to trace more distant causation when there is a cognitive component to the defendant's fault than when the defendant's conduct results from simple or heightened negligence.''); *Restatement (Second) of Torts* § 501 cmt. a (1965).

supreme law of the land — *among* the states and, to the extent of the powers conferred by the states, governs them just as much as the federal government.

Although municipalities therefore have an important role in the constitutional structure, federalism is not a euphemism for unchecked municipal power. It is, instead, the principle that "under our federal system, the States possess sovereignty concurrent with that of Federal Government, subject only to limitations imposed by the Supremacy Clause." *Gregory* v. *Ashcroft*, 501 U.S. 452, 457 (1991) (quoting *Tafflin* v. *Levitt*, 493 U.S. 455, 458 (1990)). This sharing of power is so crucial to our form of government that this Court recently wrote, "[i]n the tension between federal and state power lies the promise of liberty." *Id.* at 459.

One of the cornerstones of the federal system embodied in the Constitution is that courts and an independent judiciary, both state and federal, are expected to remedy constitutional violations. *See, e.g., Howlett* v. *Rose*, 496 U.S. 356, 367 (1990) ("[T]he Constitution and laws passed pursuant to it are as much laws in the States as laws passed by the state legislature."); *Testa* v. *Katt*, 330 U.S. 386, 391 (1947) (holding that the States are obligated to enforce the Constitution). Here, consistent with the very purposes behind § 1983 which this Court has repeatedly articulated, constitutional interests enforced through the federal courts serve as a check on state policy. The federalist notion of carefully delegated powers to a central government "assumes that we have a system of checks and balances . . . [and] utilizing the power vested in [a federal] court to check an abuse of state or municipal power is, in effect, consistent with the separation of powers principle." *Hawkins* v. *Town of Shaw*, 437 F.2d 1286, 1292 (5th Cir. 1971).

Contrary to the warnings voiced by Petitioner and its *amici*, the Fifth Circuit's decision does not in any way sweep away

the determination by many states that a misdemeanor conviction should not automatically disqualify a candidate for a state or local law enforcement position. The decision simply determines that it was entirely consistent with the purposes behind § 1983 and this Court's precedents to impose municipal liability when a final policymaker turns a deliberately blind eye to the fact that a law enforcement job applicant has a long and troubling record of recent arrests for violent and disruptive conduct. This does not offend federal principles. It promotes them.

The straightforward answer to Petitioner's question — how are States to predict what will pass constitutional muster, Pet'r. Br. at 30 — is found in this Court's precedents interpreting the purpose and scope of § 1983: a municipality will be and should be liable for its hiring decisions if they are "deliberately indifferent" to the constitutional rights of citizens. It was the rule prior to *Brown* and it is unchanged by the Fifth Circuit's decision here.

II. SINGLE DECISIONS BY FINAL MUNICIPAL POLICYMAKERS CAN HAVE A PROFOUND EFFECT ON WOMEN'S CONSTITUTIONAL RIGHTS AND MUNICIPALITIES SHOULD REMAIN LIABLE FOR SUCH DECISIONS.

Amici, groups devoted to preserving women's civil rights under the Constitution, urge this Court to reaffirm the law imposing municipal liability under § 1983 for single acts that are deliberately indifferent to constitutional rights. Section 1983 single act liability plays a critical role in protecting the constitutional rights of all citizens, especially protected groups such as women and girls. Regardless of whether the Court has questions about § 1983's application to the facts of this case, which *amici* believe was appropriate, the Court should recognize that § 1983 liability for single acts of municipalities is well-established and essential to protecting civil

rights. *Amici* illustrate below the importance of this application of § 1983 in cases where women's civil and constitutional rights have been violated by the single act of a municipal policymaker.

A. Rights to Bodily Integrity.

This Court recognizes a woman's constitutional right to bodily integrity. *See Planned Parenthood* v. *Casey*, 505 U.S. 833, 869, 915 (1992) (The "constitutional interest in liberty . . . [includes] a right to bodily integrity, a right to control one's own person" and the right of a woman "to retain . . . ultimate control over her . . . body.")[13] Sexual abuse of women and girls by municipal actors and the consequent violation of their right to bodily integrity occurs with unfortunate frequency.[14]

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13. *Cf. Doe* v. *Taylor Indep. Sch. Dist.*, 15 F.3d 443, 451 (5th Cir.) (en banc), *cert. denied*, 115 S. Ct. 70 (1994) (recognizing the right to bodily integrity in a § 1983 case); *Dang Vang* v. *Vang Xiong X. Toyed*, 944 F.2d 476, 479 (9th Cir. 1991) (recognizing that rape is a violation of a constitutional right).

14. Since 1989, at least seventeen judges, police officers, correctional officers, and border patrol agents have been prosecuted and sentenced under 18 U.S.C. § 242 (1996), the criminal counterpart to § 1983, for improperly using their positions to rape and sexually assault women. Motion for Leave to File Brief *Amici Curiae* and Brief *Amici Curiae* of the Southern Poverty Law Center, *et al.*, in Support of the Petition for Writ of Certiorari at 8, *U.S.* v. *Lanier*, 73 F.3d 1380 (6th Cir.) (No. 95-1717), *cert. granted*, 1996 U.S. LEXIS 3915 (U.S. 1996) (citing Department of Justice Statistics, U.S. Department of Justice, Civil Rights Division, Criminal Section); *see also United States* v. *Price*, 383 U.S. 787, 794 n.7 (1966) (stating that the civil counterpart of § 242 is § 1983).

Likewise, incidents of sexual abuse in schools have been described by courts as "epidemic." *Doe* v. *Estes*, 926 F. Supp. 979, 988 (D. Nev. 1996). *See also* William W. Watkinson, Jr., Note, *Shades of DeShaney: Official Liability Under 42 U.S.C. 1983 for Sexual Abuse in the Public Schools*, 45 Case W. Res. L. Rev. 1237, 1238-41 (1995) (discussing the problem of sexual abuse in public schools).

Section 1983 single act liability serves as a powerful tool to protect this civil right.

In *Hillsboro Indep. Sch. Dist.*, 81 F.3d at 1404, for example, the Fifth Circuit upheld a § 1983 claim, on a motion to dismiss, against a county school district for its hiring policy that caused a violation of a girl's right to bodily integrity. A school official hired a school custodian without investigating his criminal background. 81 F.3d at 1399. The custodian subsequently grabbed and raped a thirteen-year old girl in the school. *Id.* "Just as the histories of prospective police officers must be scrutinized routinely for violence or unlawful conduct in the interest of the public's safety," the court wrote, "the criminal histories of prospective school employees must be scrutinized in the interest of students' safety." *Id.* at 1403. "Common sense recommends — and state law demands — ," the court continued, "that, in the interest of the safety of school children, school officials investigate the criminal histories of prospective school employees." *Id.* The court held that the alleged hiring inadequacies "reveal[ed] a deliberate indifference to Doe's welfare." *Id.*[15]

Similarly, the district court in *Doe* v. *Estes*, 926 F. Supp. 979, 988 (D. Nev. 1996), denied the school district's motion for summary judgment where the plaintiff, a student who had been sexually molested by a school teacher, presented evidence that the school was deliberately indifferent and failed to

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15. The court found that the school district's hiring policies were inadequate because it had hired a custodial staff, one third of which consisted of convicted criminals. *Id.* at 1403. The court also stated that "'[s]urely the District's hiring and giving the schoolhouse keys to even one convicted murderer constitutes the hiring of an applicant with 'seriously deficient character.'" *Id.*

prevent the attack. The court stated that the "last fifteen years have seen . . . shocking incidents [of sexual attacks by teachers on students] repeated in dozens of communities across this country" and that "[s]chool children are particularly vulnerable to mistreatment at the hands of adults, especially where those adults are cloaked with the authority of the state." *Id.* at 987-88. The court thus found that the risk of sexual abuse in school was "so obvious" that a school district's failure to take preventive action constitutes deliberate indifference. *Id.* at 988. *See also Bolon* v. *Rolla Public Schools*, 917 F. Supp. 1423, 1430-31 (E.D. Mo. 1996) (Section 1983 claim relating to Rolla Public Schools' policy of failing to train with respect to students' rights to bodily integrity held sufficient to withstand defendant's motion for summary judgment).

Courts have also found § 1983 municipal liability in cases where school officials were aware of an employee's attacks on school children but failed to do anything to prevent future attacks. For example, in *Stoneking* v. *Bradford Area Sch. Dist.*, 882 F.2d 720, 722 (3d Cir. 1989), *cert denied*, 493 U.S. 1044 (1990), a female high school student who had been sexually abused by the school band director over a period of five years brought a claim against the school district under § 1983 for failing to prevent the abuse. She alleged that the school's principal maintained a file on the band director which contained reports of female band students' complaints of sexual misconduct and that the principal and other school officials knew the risk the band director posed to female students, but did nothing to protect the female student body. 882 F.2d at 722. The court held that the student's § 1983 claim was viable based on evidence that the school officials "with deliberate indifference to the consequences, established and maintained a policy . . . which directly caused her constitutional harm." *Id.* at 725. *See also Doe* v. *Bd. of Educ.*, 833 F. Supp. 1366, 1379-80 (N.D. Ill. 1993) (Section 1983 claim against school district held sufficient where school district knew of and failed

to report instances of sexual abuse committed by teacher against minor female students thus allowing teacher to abuse the plaintiff).

Section 1983 liability also protects adult women from single municipal acts that violate their right to bodily integrity. In *Parker* v. *Williams*, 862 F.2d 1471, 1481 (11th Cir. 1989), for example, the Eleventh Circuit remanded for retrial the following issue of causation: whether an inadequate hiring policy caused constitutional injuries to a woman. In that case, the former sheriff and final policymaker of Macon County, Alabama, hired a chief jailer without investigating his background. 862 F.2d at 1480. The jailer subsequently raped a female criminal suspect. *Id.* at 1473. The chief jailer's background revealed that he had been convicted of indecent exposure, had undergone treatment for mental problems, including memory lapses, talking to himself, and multiple personality experiences, and had a history of drug use. *Id.* at 1477.[16]

B. Rights to the Equal Protection of the Law.

Section 1983 has played a vital role in enforcing a woman's constitutional right to equal protection of the law. The right to equal protection forbids discrimination against women. *See Reed* v. *Reed*, 404 U.S. 71, 73 (1971); *U.S.* v. *Virginia*, 116 S. Ct. 2263, 1996 WL 345786 at *11 (1996) ("[T]he Court has repeatedly recognized that neither state nor federal

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16. *See also Women Prisoners* v. *Dist. of Columbia*, 877 F. Supp. 634, 667 (D.D.C. 1994) (District held liable under § 1983 for violation of women prisoners' Eighth Amendment rights where prisoners endured sexual assault, in part, as the result of the district's failure to train officers with respect to sexual harassment).

government acts compatibly with the equal protection principle when a law or official policy denies to women, simply because they are women . . . equal opportunity to . . . participate in and contribute to society based on their individual talent and capacities.'').

Sexual harassment by a state actor violates a woman's right to equal protection.[17] Women who have been sexually harassed by municipal actors have prevailed in § 1983 claims against the municipalities. In *Starrett* v. *Wadley*, 876 F.2d 808, 819 (10th Cir. 1989), the municipality was held liable under § 1983 for the discriminatory acts of the county assessor. The county assessor had final policymaking authority over hiring and firing personnel and fired an employee who had spurned his advances. 876 F.2d at 818. Prior to the firing, he "began scrutinizing her work more carefully than the work of other employees, singling out her work for special review and making changes on her work cards." *Id.* at 815. The Tenth Circuit ruled that "[b]ased upon the evidence . . . we hold that the jury reasonably could have concluded that [the assessor's] conduct toward plaintiff discriminated against her because of her sex and thereby deprived her of the right to equal protection of the laws." *Id.*

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17. *See, e.g., Saville* v. *Houston County Healthcare Auth.*, 852 F. Supp. 1512, 1531-32 (M.D. Ala. 1994) and cases cited therein (holding sexual harassment violates the Equal Protection Clause). *See also Williams* v. *Dist. of Columbia*, 916 F. Supp. 1, 6 (D.D.C. 1996) (District could be held liable for supervisor's sexual harassment if supervisor had final policymaking authority and there was a nexus between the authority and the conduct); *Hubbard* v. *City of Middletown*, 782 F. Supp. 1573, 1579 (S.D. Ohio 1990) (city could be held liable for final policymaker's sexual harassment of female plaintiff).

In *Reynolds* v. *Borough of Avalon*, 799 F. Supp. 442, 446 (D.N.J. 1992), the court found that plaintiff had stated a § 1983 claim against a municipality for its failure to stop harassment in the workplace. The court held that "a reasonable jury might find that the risk of sexual harassment in the workplace is so obvious that an employer's failure to take action to prevent or stop it from occurring — even in the absence of actual knowledge of its occurrence — constitutes deliberate indifference, where the employer has also failed to take any steps to encourage the reporting of such incidents." 799 F. Supp. at 447.

Similarly, in *Poulsen* v. *City of N. Tonawanda*, 811 F. Supp. 884 (W.D.N.Y. 1993), the court held that material issues of fact precluded summary judgment as to whether the municipality had a policy which led to a hostile work environment for female police officers. 811 F. Supp. at 897. The court noted that a municipality may be subject to § 1983 liability on the basis of a policy that tolerates unconstitutional acts by its employees. *Id.* at 896. In *Poulsen*, the court determined that the police chief "was well aware of the incidents of sexual harassment and that his failure to do more than investigate and attempt to segregate the alleged harasser from his victim constituted knowing and deliberate indifference to withstand a motion for summary judgment on this issue." *Id.* at 897.[18]

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18. *See also Saville*, 852 F. Supp. at 1534-35 (institution could be held liable for a director's act of appointing to a student's evaluation team an instructor whom the student had previously accused of sexual harassment); *Fuchilla* v. *Prockop*, 682 F. Supp. 247, 260-61 (D.N.J. 1987) (university could be held liable for agents' single act of refusing to provide female plaintiff with an appropriate position after she accused university employee of sexual harassment).

A further example of § 1983's single act application is in the area of domestic violence. Municipalities that treat complaints of domestic violence less seriously than other equally violent crimes may be liable under § 1983 for discriminatory treatment. In *Smith* v. *City of Elyria*, 857 F. Supp. 1203, 1207 (N.D. Ohio 1994), for example, police inattention to repeated calls for help resulted in the complainant being killed by her ex-husband. In numerous calls to the police about the domestic violence, including calls from the complainant's nine-year old daughter, the police dispatcher's responses ranged from "this is not a police matter" to "[t]hese people are . . . making me mad!" 857 F. Supp. at 1207. When the police finally arrived, the woman had been stabbed twelve times by her ex-husband. *Id.* at 1205. In rejecting the municipality's motion for summary judgment, the court found that "[t]he record contains considerable evidence that the police department treated domestic disputes differently than non-domestic disputes, and this had a disproportionately adverse impact on women because women are victims of domestic violence more frequently than men." *Id.* at 1212.[19]

19. Similarly, in *Balistreri* v. *Pacifica Police Dept.*, 901 F.2d 696 (9th Cir. 1988), the plaintiff argued that the police department's treatment of her calls caused her to suffer physical injuries and emotional distress at the hands of her husband. After being severely beaten by her husband, police officers who responded to her request for assistance were "rude, insulting and unsympathetic" and refused to place her husband under arrest. 901 F.2d at 698. One of the officers stated that "he did not blame plaintiff's husband for hitting her, because of the way she was 'carrying on.'" *Id.* at 701. The court denied the defendant's motion to dismiss, stating that the department's actions "strongly suggest an intention to treat domestic abuse cases less seriously than other assaults, as well as an animus against abused women." *Id.*

Navarro v. *Block*, 72 F.3d 712 (9th Cir. 1996), illustrates yet another instance in which a municipality's inaction toward a woman's emergency plea for police protection resulted in her death at the hands of her batterer. In *Navarro*, the court reversed and remanded a summary judgment ruling to determine whether a municipality had a policy of classifying domestic violence calls as non-emergencies and, if so, whether this violated the Equal Protection Clause. 72 F.3d at 717. In *Navarro*, a woman had called "911" to request emergency assistance because she had learned that her estranged husband "was on his way to kill her." *Id.* at 713. The police dispatcher responded that "[w]e can't have a unit sit there to wait and see if he comes over." *Id.* Fifteen minutes later, the woman's estranged husband arrived at her home and shot and killed her and four other people. *Id.* at 714.[20]

Single act liability under § 1983 thus plays a critical role in protecting the civil and constitutional rights of women. This case does not present the Court with any grounds, factual or constitutional, to overturn its precedents under § 1983.

20. *See also Watson* v. *City of Kansas*, 857 F.2d 690, 696 (10th Cir. 1988) (district court erred in granting summary judgment to the city where female plaintiff provided sufficient evidence that the city followed a policy of affording less protection to domestic violence victims, that the city acted with a discriminatory motive in pursuing this policy, and that her injuries were a result of this policy); *Cellini* v. *City of Sterling Heights*, 856 F. Supp. 1215, 1221 (E.D. Mich. 1994) (denial of defendant's motion for summary judgment where plaintiff presented sufficient evidence of a policy of treating domestic assaults differently than other assaults and that this unexplained discrepancy could give rise to an inference that the police department acted with discriminatory motive).

CONCLUSION

For the foregoing reasons, the judgment of the United States Court of Appeals for the Fifth Circuit should be affirmed.

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Respectfully submitted,

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APPENDIX

NOW Legal Defense and Education Fund

NOW Legal Defense and Education Fund ("NOW LDEF") is a national non-profit civil rights organization that performs a broad range of legal and educational services supporting women's efforts to combat gender-based discrimination and secure equal rights. Founded as an independent organization in 1970 by leaders of the National Organization for Women, NOW LDEF works on many fronts to eliminate gender-motivated violence. Most significantly, NOW LDEF chaired the national task force instrumental in passing the historic Violence Against Women Act and continues to track legal developments under that Act. NOW LDEF has participated as counsel and as *amicus curiae* in many cases supporting the rights of women victims of domestic and other gender-motivated violence by both private and governmental actors.

California Women Lawyers

California Women Lawyers ("CWL") is a statewide bar association representing the interests of approximately 25,000 women lawyers, judges, law professors, and law students in California. CWL has both individual members and thirty local affiliates throughout the state. Since its inception in 1975, CWL has sought to improve the legal climate for women, through both the legislative and judicial process. Specifically, CWL is committed to securing the enforcement of women's civil rights against violence, harassment, and discrimination by public or private actors.

Connecticut Women's Education and Legal Fund, Inc.

The Connecticut Women's Education and Legal Fund, Inc. (''CWEALF'') is a non-profit women's rights organization with more than 1,400 members. Incorporated in 1973, CWEALF's mission is to work through legal and public policy strategies and community education to end sex discrimination and to empower all women to be full and equal participants in society.

Equal Rights Advocates

Equal Rights Advocates (''ERA'') is a San Francisco-based public interest law center dedicated to the empowerment of women through the establishment of their economic, social, and political equality. Since its inception over twenty years ago, ERA has specialized in litigating cases and pursuing public policy initiatives designed to assure women equal access to all of society's benefits including employment, education, and public accommodations.

National Coalition of 100 Black Women, Inc.

The National Coalition of 100 Black Women, Inc. (''NCBW'') is a non-profit, volunteer organization dedicated to community service, leadership development, and the enhancement of career opportunities through networking and programming. It has sixty-one chapters in twenty-four states, with a growing membership of more than 6,000 women. The NCBW works to empower Black women through various programs, which, among other things, do the following: provide a network among Black women; establish links between the organization and the corporate and political sectors; make Black women a visible force in the economic and political arenas; provide role models, mentors, and guidance to young women; and recognize the historic and current achievements of Black women.

National Organization for Women Foundation

The National Organization for Women Foundation (''NOW Foundation'') is a non-profit organization devoted to furthering women's rights through education and litigation. The NOW Foundation is affiliated with the National Organization for Women, the largest women's rights organization in the United States, with a membership of over 200,000 women and men in more than 600 chapters in all fifty states and the District of Columbia. Since its inception in 1986, one goal of NOW Foundation has been to ensure that the constitutional rights of individuals are not violated by local, state, or federal authorities.

Northwest Women's Law Center

The Northwest Women's Law Center (''NWLC'') is a non-profit public interest organization that works to advance the legal rights of women through litigation, education, legislation, and the provision of legal information and referral services. Founded in 1978, NWLC is dedicated to challenging barriers to gender equality and ensuring that victims of all forms of discrimination are able to obtain appropriate relief. Toward that end, NWLC has participated in cases throughout the country to ensure the availability of legal remedies for plaintiffs in numerous cases involving issues such as sexual harassment and discrimination, domestic violence, and enforcement of local ordinances that protect access to health care facilities.

Women Employed

Founded in 1973, Women Employed is a national organization of working women, numbering 2,000. Based in Chicago, the organization has assisted thousands of working women with problems of sex discrimination. Women Employed

works to empower women to improve their economic status and to remove barriers to economic equity through advocacy, direct service, and public education. The organization has a long history of monitoring the performance of equal employment opportunity enforcement agencies, specifically the Department of Labor's Office of Federal Contract Compliance Programs and the Equal Employment Opportunity Commission. Women Employed analyzes Equal Employment Opportunity policies and develops specific, detailed proposals for improving enforcement and litigation efforts.

Women's Equal Rights Legal Defense and Education Fund

Founded in 1978, the Women's Equal Rights Legal Defense and Education Fund (''WERLDEF'') is a California based non-profit corporation organized to ensure that women will be treated equally under the law. WERLDEF vindicates women's rights both by educating them about their legal rights and by providing them access to the courts.

Women's Law Project

The Women's Law Project (''WLP'') is a non-profit, feminist legal advocacy organization located in Philadelphia. Founded in 1974, WLP works to abolish discrimination and injustice and to advance the legal and economic status of women and their families through litigation, public education, and individual counseling. WLP's activities have included challenges to gender discrimination in employment, education, insurance, and health care. WLP has also engaged in extensive advocacy and public education in family matters relating to custody, support, domestic violence, and divorce.

Women's Legal Defense Fund

Founded in 1971, the Women's Legal Defense fund is a national advocacy organization that promotes policies to help

women achieve equal opportunity, quality health care, and economic security for themselves and their families. The organization has participated as *amicus curiae* in numerous Supreme Court cases concerning women's rights and interests.